No. 316.

United States Circuit Court,

Sixth Judicial Circuit, Western District of Tennessee.

IN EQUITY.

CALVIN AMORY STEVENS, on behalf of the HOLDERS of Internal Improvement Bonds of Tennessee, issued to the Memphis and Ohio Railroad Co.,

versus

The Louisville and Nashville Railroad Co., et al.

ANSWER.

RUSSELL HOUSTON,
ESTES & ELLETT,
ED. BAXTER,
Solicitors, and of Counsel for Respondents.

No. 316.

THE ANSWER OF THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY (SUED BY THE NAME OF THE LOUISVILLE AND NASHVILLE AND GREAT SOUTHERN RAILROAD COMPANY), DEFENDANTS, TO THE BILL OF COMPLAINT FILED BY CALVIN AMORY STEVENS IN THE UNITED STATES CIRCUIT COURT FOR THE WESTEN DISTRICT OF TENNESSEE, IN EQUITY, NO. 316 ON THE RULE DOCKET OF SAID COURT.

These defendants now, and at all times hereafter, saving to themselves all manner of benefit, or advantage of exception, or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof, as these defendants are advised it is material to make answer to, answering, say:

They admit that the Louisville & Nashville Railroad Company are a body politic and corporate, chartered by acts of the General Assembly of the Commonwealth of Kentucky. The right of way to construct their railroad from the line between the States of Kentucky and Tennessee to Nashville, was granted them by acts of the General Assembly of Tennessee; but they have never been incorporated by said State, and therefore are not citizens of it, but of the State of Kentucky.

They admit that the Memphis and Ohio Railroad Company were a corporation organized in the State of Tennessee by virtue of and under certain acts of the General Assembly of that State. They also admit that said company was originally chartered under the name of the Nashville and Memphis Railroad Company, but in pursuance of an act passed

in 1853, the name was changed to the Memphis and Ohio Railroad Company.

They admit that the object and purpose of the creation of said corporation by the said charters, was the construction, completion, and thereafter the operation and management, of a line of railway for the transportation of passengers and freight, from the city of Memphis in the State of Tennessee through the territory of the State of Tennessee to a point on the Memphis, Clarksville and Louisville Railroad. For this purpose such powers were granted to said corporation, as are declared in the several charters and acts of incorporation. The said corporation was authorized to borrow money for the purposes of the enterprise. It was likewise authorized to impose liens and execute mortgages upon its property to provide for and insure the payment of its liabilities.

Respondents admit that in 1867 they leased the said Memphis and Ohio Railroad for a period of ten years. On February 15, 1871, a proposition for the consolidation of the the two companies was agreed upon—one of the terms of which was that by an exchange of stocks, a majority of the capital stock of the Memphis and Ohio Railroad Company should be transferred to respondents. This was afterwards done, and on October, 9, 1872, formal articles of consolidation were perfected, the name of the Louisville and Nashville Railroad Company being retained as the title of the consolidation. And respondents now own, possess and operate said railroad.

Respondents have not been furnished with a copy of Exhibit A. to the bill, which is said to contain the several charters and acts, with their several amendments, passed by the Legislature of Tennessee relative to said corporation; therefore they can neither admit nor deny their correctness, and they

demand strict proof thereof, so far as the same may be material.

Before passing to the act of February 11, 1852, respondents would respectfully show to the court that as far back as 1829, by chapter 75 of the acts of that year, the State of Tennessee began a regular system of internal improvements in said State, and from that time, at almost every Legislature, one or more acts were passed as to this system; each attempting to perfect the scheme, and to avoid such difficulties as arose from time to time, or such as the wisdom of said Legislature discovered. Such prior legislation, as well as the legislation subsequent to the act of 1851–2, make the legislative intent in the act of 1851–2 plain, if indeed there can be any doubt of the true meaning of said act upon its face.

Respondents will not extend this answer by quoting from all of said acts, but will give a brief summary thereof, and produce said acts on the hearing. By the act of 1829 aforesaid, the State established a system of internal improvements, the leading features of which were the incorporation of certain persons as a Board of Six Internal Improvement Commissioners, the members of which were to be elected by the General Assembly, for the State at large, and they were to judge of, and appropriate to internal improvements, an amount of money set apart by said act, and such as should thereafter be set apart. This scheme with certain modifications as to appointment of commissioners, and distribution of funds, continued in force and favor until 1834, when by constitutional provision, the Legislatures were enjoined to encourage and establish an effective system of internal improvements. In 1835, by ch. 22 of the acts of that year, a general system of internal improvements was adopted, as to

railroads and turnpikes, by which the scheme of 1829 was abandoned, and a new plan inaugurated. This scheme of 1835 provided, that when such Internal Improvement Company should obtain a subscription of two-thirds of its stock, which in the opinion of the Governor, Comptroller, Treasurer, and Secretary of State, was well secured, the State should subscribe the remaining one-third. The State was to pay its subscription in State bonds, which should be *payable to the president and directors* of such company or their assigns. The interest on the State bonds so issued was to be paid *by the company* in the first instance, to be deducted out of any dividends on the stock owned by the State afterwards accruing. The Governor was to appoint one-third of the directors of such company. By the Acts of 1837–8, ch. 107, 108, the scheme of 1835 was continued with a few important changes. Said last mentioned act provided that the Governor should appoint one-half of the directors (who should not be stockholders), and if in the opinion of two-thirds of the whole board of directors, the individual stock (which was required to be one-half of the whole capital stock) was well secured, or the stockholders were solvent and fully able to pay the stock subscribed for by them respectively, and had paid ten per cent. on their stock, the State should subscribe for the other one-half of the stock, and should issue its bonds in payment thereof, only as, and to the extent that, individual stockholders should pay in their subscriptions from time to time. The interest on such bonds was to be paid through the Bank of Tennessee (which was by said acts chartered, and made the fiscal agent of the State,) out of the dividends of the bank, and the profits arising from the stock of the State in the Internal Improvement Companies. And in the event they were insufficient, the Governor was to notify the companies three months in advance of

maturity of interest of the probable deficit, and it was thereupon the duty of the companies to call upon their stockholders for an amount on unpaid stock sufficient to meet the deficit, to be paid on penalty of forfeiture of the stock of those not responding to the call. By sec. 24 the State retains a lien on the entire works of said companies respectively, for the amount paid in by the State. And by sec. 26, the profit arising upon the stock owned by the State in internal improvement companies was to *constitute a fund to redeem the internal improvement bonds* and the bonds issued by the State to raise the capital of said bank. It soon became apparent that this partnership between the State and private persons was troublesome and unwise; and accordingly by the first chapter of the Acts of 1839-40, all acts authorizing the State to subscribe stock in internal improvement companies were repealed. Provision was made for a dissolution of such partnership by surrender of charters, etc., to avoid further issuance of bonds in payment of past subscriptions, etc.; and where companies refused to surrender charters, certain investigations were ordered to be made, and many restrictions and limitations were imposed. In the Acts of 1843–44, ch. 226, a committee was appointed to inquire and report, first, the actual cost of roads in which the State owned stock; second, the amount paid by individual stockholders, and the amount paid by the State; third, the amount of revenue collected from each road, and how appropriated; fourth, what companies had been organized and drawn bonds of the State, and the several amounts; fifth, what progress had been made in the construction of said roads; sixth, what amount of bonds had been issued, and to what companies, since the act of January 25, 1840; and further, "to enquire into the defects, and suggest such amendments to the laws then in force as would thereafter insure

justice to the State and a proper accountability of the companies." In the Acts of 1845–6, page —, a joint resolution was adopted reciting that "whereas after applying the surplus dividends of the bank, and the contingent fund, and the uninvested dividends declared on the stock owned by the State in the several internal improvement companies, there remained a large deficiency in liquidating the interest on the State bonds issued for internal improvements," therefore it was resolved that the Governor notify each company of its delinquency, and that the Attorney-General institute suit under the Act of 1837, ch. 107, sec. 20, selecting some company as a test case.

In the Acts of 1847–8, ch. 169, sec 2, *et seq.*, an entirely new plan of obeying the direction of the Constitution of 1834, as to aiding internal improvements was devised, to wit: The abandonment of the stock partnership plan, and, instead of issuing its own bonds, the State, upon certain conditions precedent, was authorized to indorse and guarantee the mortgage bonds of the companies. The board of internal improvement were required to take a satisfactory indemnity against the State's paying either the principal or interest of bonds so indorsed, first, by a lien on the whole stock of the company, and second, by a lien on the road and fixtures as built and put in operation. Under this act $500,000 of the bonds of the Nashville and Chattanooga R. R. Company, and $350,000 of the bonds of the East Tennessee and Georgia Railroad Company were to be indorsed by the State, and as respondents are informed and believe many other bonds were indorsed by the State under said act, and put into circulation. The State also at other times indorsed the bonds of other internal improvement companies, and of others, and whenever in the acts of said State, bonds are referred to as bonds upon

which the State is *secondarily* liable, the reference is to such indorsed bonds and no other.

Respondents further answering as to the internal improvement system of said State, say, that while the scheme of 1848 avoided the stock partnership, etc., of the State and company, and other defects of the former schemes, it soon became apparent that there were serious defects in said scheme; among which were, first, a failure to provide the State authorities with such information from time to time as would put them in a position to act advisedly, and at the proper time to secure her interest; second, there was no reservation of a power to legislate thereafter so as to secure herself from loss by reason of said indorsement in such manner as the State deemed best calculated to protect her interest; third, being an indorser and guarantor of the company's bonds, she was practically a joint obligor or partner with the company in the liability on said bonds, and her only means of protecting herself, or successfully asserting her rights, depended in a large measure upon others over whom she had no control; and even in the best possible case, she was bound to divest herself of her sovereign protection against law suits by applying to Courts for relief, in which event she was subject to the law's delays, and stood in no higher or better position than any other party or suitor; fourth, the lien of the State was not declared and reserved in a public act authorizing the indorsement of said bonds by the State, but such lien was to be created by the deed of the company, and the power to require the creation of such lien was delegated to the Board of Internal Improvement Commissioners.

At the next session of the Legislature an effort was made to correct some of the defects in the scheme last above mentioned, as shown by Acts of 1849–50, ch. 42, sec. 11, *et seq.*, repealing so much of the last

above named act as authorized the Governor to indorse the bonds of the East Tennessee and Georgia Railroad Company; and instead thereof, providing that the State should issue her own bonds, and that said road and its appurtenances, the interest of individual stockholders, the tolls, issues and profits, should, by force of said act, be vested in the State to secure her against the payment of the *debt* authorized by said act. It was required that the terms of the act be accepted and ratified by the individual stockholders, but no specific means to get the necessary information as to condition of road, and no means by which the State, as a sovereign, without regard to any other person, could legislate as she chose in protecting herself, was provided. And no provision was made that she, as a sovereign, without the intervention and aid of a Court, might take possession whenever she deemed it to her interest.

At its next session the General Assembly of the State of Tennessee, by an act passed February 11, 1852 (ch. 151, p. 204, of Pamphlet Acts 1851–2), entitled "An Act to establish a system of Internal Improvements in this State," determined to lend to the railroad companies within its limits, and specified in said act, the "coupon bonds of the State of Tennessee" "for procuring the iron rails, chairs, spikes and equipments," "and for putting down said iron rails" upon their several lines of railway. The plan of that legislation was, that each railroad company should procure *bona fide* subscriptions for its capital stock to an amount sufficient to grade, bridge, and prepare for the iron rails the whole extent of its main trunk line, and should grade, bridge, and have ready the necessary timbers for the reception of rails, and have fully prepared a section of thirty miles of said road at either terminus, in a good and substantial manner, with good materials, for putting on the iron rails and

equipments. The Governor of the State was to be notified, and satisfied, of these facts, and that said section, or any part thereof, was not subject to any lien whatever, other than those created *in favor of the State* by the acts of 1851–2. By means of these preliminary requirements, it was thought that assurance was obtained that each railroad company would be competent to fulfill the obligations it was to incur under said statute. No road was to be entitled to State aid under said act unless it should, within four years, complete at least one section of thirty miles, or the whole length of its road if less than thirty miles long. The Governor of the State was to "issue to said company coupon bonds of the State of Tennessee to an amount not exceeding eight thousand dollars per mile on said section." The bonds were "not to be used for any other purpose than for procuring the iron rails, chairs, spikes, and equipments for said section, and for putting down said iron rails," and the Governor was authorized to appoint a commissioner to act, under oath, in conjunction with the president of the company," in negotiating said bonds for the purposes aforesaid, and in any other matters pertaining to said company where *the interest of the State*, in the opinion of the Governor, required it. The act was made a public law, for all purposes of notice. The act itself did not adopt any system of numbering for distinguishing each bond, or identifying the company to which it was issued, nor did said act authorize any officer or other person to adopt any such system. Another act of the same session (1851–2), passed February 21, 1852 (Acts 1851–2, p. 222), did provide, that the bonds which might be issued "under the acts (then) *present* General Assembly as a loan to internal improvement companies, should be numbered by the Secretary of State, who, upon delivering said bonds to the company, should take

a receipt, reciting the number, date, and amount of said bonds, in a well bound book, to be deposited in his office." Such receipts were doubtless taken, and kept in said office, and from them *the State* could at any time identify the bonds which had been loaned to each of the railroad companies; but there was nothing upon any of the bonds by which the purchaser could tell to what company they had been loaned. As a matter of fact, the purchasers of said bonds did not know, when they purchased the same, to what companies they had been issued, for the information contained in the receipts taken by the Secretary of State, as to the bonds loaned before the late war, was never made public until 1875, and then only in a report made by John C. Burch, Comptroller; and the information relative to the bonds loaned after the war, was not made public until October, 1869, and then only in a report made by G. W. Blackburn, Comptroller. The general law of Tennessee, Code, sec. 209, requires the Comptroller to register the number and date of *all* State bonds, showing for what purpose and to whom issued. The act of February 21, 1852, requiring a registry of the bonds loaned to railroads, simply placed them on the same footing with the other bonds of the State, and therefore has no special significance.

Respondents deny that by the tenor of the act which gave existence to the bonds, each company became liable upon, or bound to perform, the obligations contained in, or represented by, the bonds loaned to it. On the contrary, the company was not liable *upon the bonds* at all; its name does not in any way appear, either in or upon the bond, either as maker, surety, guarantor, or endorser. The only "obligation contained in or represented *by the bond*," is the obligation of the *State of Tennessee* to pay to the holder the principal and inter-

est due thereon as the same matures—an obligation with which the company had nothing to do. If complainant's construction were correct, the bonds loaned by the State to the best railroads would have commanded a higher price than bonds loaned to inferior roads; but, as a fact, there has never been the slightest difference in the market price between bonds issued to the most important roads and those issued to the most unimportant ones. To illustrate: The Louisville and Nashville Railroad Company have always met promptly their bonded obligations at maturity, while the Edgefield and Kentucky Railroad Company defaulted before the war on the interest due from them to the State, and has never since paid any part thereof; their road was afterwards sold, as an insolvent road, by proceedings in the Chancery Court at Nashville, instituted by the State of Tennessee to enforce its lien for bonds loaned to said company. The State has been in default ever since July 1, 1875, upon the interest upon all of her bonded debt, and yet there is, to-day, no difference in price, in the New York market, between the State bonds loaned to the Louisville and Nashville Railroad Company and those loaned to the Edgefield and Kentucky Railroad Company. This would not be, if it had ever been really believed that the Louisville and Nashville Railroad Company were "liable upon, and bound to perform the obligations contained in and represented by," the bonds loaned to them. The truth is, the holders of Tennessee bonds never had any idea as to what bonds had been loaned to the different railroad companies, until the reports of Burch and Blackburn were published; even then, it was never pretended that the companies were liable to the bondholders, until it was feared the State would repudiate; and even now this after-thought liability has not impressed the financial market enough to cre-

ate any appreciable difference between the prices of bonds loaned to solvent and of those loaned to insolvent roads.

Respondents deny that each company was to pay from its own means the interest upon the bonds loaned to it, as the same matured from time to time; on the contrary it was made "the duty of the company to deposit in the Bank of Tennessee, the fiscal agent of the State, fifteen days *before the interest becomes due*, from time to time," an amount *sufficient to pay* such interest, with exchange, and commissions, and it was contemplated that when the interest did mature fifteen days thereafter, it should be paid by the bank, as fiscal agent *of the State*

Respondents deny that "each company was to pay and discharge the principal debt, as it was expressed upon said bonds, when the same matured;" on the contrary, the bonds had thirty or forty years to run before maturity, and the act required each company, at the end of five years after the completion of its road, to set apart one per cent upon the amount of bonds issued to the company, and use the same in the purchase of bonds (*i. e.*, any bonds) of the State of Tennessee, which bonds, were to be *paid* by the company into the treasury of the State, after assigning them to the Governor The Governor was to give the company a receipt for them, and, as between the State and the company, the bonds so paid in were to be a credit on the bonds issued to the company. The bonds so paid in, with the accruing interest thereon, were "to be held and *used by the State* as a sinking fund for the payment of the bonds issued to the company." This fund was to be used for the payment of the bonds, and *the State* was to use it for that purpose. If any of the bonds so purchased had been issued to the company purchasing them, which fact could be

ascertained by the State from the receipts in the office of the Secretary of State, they were to be not only credited to the company on its debt to the State, but being assigned to the Governor of the State, were to be treated as paid by the State, and cancelled; if, however, any of the bonds so purchased had been issued to any other company, though they were passed as a credit to the company paying them in, as between that company and the State, they were of course not to be a credit as between the State and the company to whom they were issued, but were to be held by the State as a debt against such company; nor were they to be a credit as between the State and the holders of the bonds loaned to the company paying them in.

Respondents admit that the bonds were to be made payable at such place in the United States as the president of the company might designate, and that the sale of said bonds was to be the means of raising the money requisite for "procuring the iron rails, chairs, spikes and equipments for said road, and for putting down said iron rails."

It is also true that the expression does occur in said statute, "that so soon as the bonds of the State shall have been *issued* for the first section of the road as aforesaid, they shall constitute a lien upon said section so prepared as aforesaid;" "and the *State of Tennessee*, upon *issuance* of said bonds, and by virtue of the same, shall be invested with said lien or mortgage without a deed from the company for the payment by said company of said bonds, with interest thereon, as the same becomes due." And when said company should have prepared a second section, or any additional number of sections of twenty miles each, the Governor was to issue to said company like bonds of the State, to an equal amount per mile, and "upon *the issuance* of the said bonds the *State*

of Tennessee was to be invested with a like mortgage or lien, without a deed from said company, upon said stock, and upon said first additional section or sections;" "and when the whole of said road should have been completed, the *State of Tennessee* was to be invested with a lien, without a deed from the company, upon the entire road," &c. "for the payment of all of said bonds issued to the company, as provided in this act, and for the interest accruing on said bonds."

This statutory lien was to be operative *at once*, and without any conveyance or assurance of any kind from the corporations, and was to be superior to all other liens upon the entire property of any corporation receiving such public assistance in the State of Tennessee.

Respondents submit, that taken in their strictest, sense against the railroad companies, the words of the act quoted above only give a lien for the payment by the companies of the bonds and interest "*as provided in the act*," and the only mode *therein provided* is the one stated above, viz: that each company should pay to the fiscal agent, or bank of the State, fifteen days before the interest becomes due to the bondholder, an "*amount sufficient to pay such interest*," with exchange and commissions; and every year after the expiration of five years from the completion of its road, invest one per cent upon the amount of the bonds issued to it, in bonds of the State, and "*pay*" the same into the treasury of the State "as a credit on the bonds issued to such company." The lien, instead of being for the payment of the bonds and interest by the company to the bondholder, is for the payment *to the State*, by the company, of the debt created in favor of the State, against the company, by the loan of the State bonds. It is called the "lien *of the State*" throughout the act, and all amenda-

tory acts; the interest sought to be protected is called the "interest *of the State*" throughout the act and all amendatory acts; no mention is anywhere made of the bondholder, and no attention is paid to his rights or interests. The lien certainly attached upon the first section of the road "so soon" as the bonds were *issued*. Now, if the bonds for the first section were negotiated as soon as issued, the lien would, according to complainant's theory, immediately enure to the benefit of the purchasers of these bonds, who would thereby be entitled to a first mortgage upon that section, which being a terminal section, would naturally be more valuable than other sections in the middle of the line; but according to the provisions of the statute, when the bonds are issued for the second or subsequent sections, which might not be for several years after the bonds for the first section had been issued, the purchasers of the bonds issued for the subsequent sections would be entitled to displace, *pro tanto*, the prior lien of the holders of the bonds issued for the first section, and share with them the lien upon that section. This anomaly is avoided by taking respondent's construction; for, if the lien belongs to the State alone, there is no conflict between the lien which she acquires upon the issuance of the bonds to the first section, and those which she acquires upon the issuance of bonds to the subsequent sections; it is then but one lien, extending itself to the different sections as fast as completed, and covering the entire road as soon as it is finished. It is a lien in favor of *the State* to protect the *State's* interest, in each and every section, and in the road as an entirety; and it is a lien to secure the payment by the companies of the debt created by the loan to them of the State's bonds—the payment to be made "*as provided in the act*"—which requires such payment both as to interest

and principal to be made by the companies to the State, before the debt is due from the State to the bondholders, as evidenced by the bonds and coupons.

Again, if the lien is to secure the State for the debt due to the State from the companies for the loan of the bonds, it is proper that such lien should have attached "so soon" as the bonds were *issued*, and that the State should have been invested with said lien by virtue of such *issuance*. In that view the bonds might be said upon ther *issuance* to "constitute," *i. e.*, *create*, a lien in favor of the *State*. But the bonds themselves could not be a lien, and they could not "constitute" or create a lien in favor of the purchaser or holder until they were negotiated by the company. To put an actual case before the Court: The Tennessee and Alabama Railroad Company received from the State three hundred bonds in July and September, 1854. The English merchants who sold them their iron failed to deliver it according to contract, and the company refused to pay them, but they reserved one hundred and forty-three of the bonds until the dispute could be settled, and they continued in the company's possession until after August, 1855. On the 30th of June, 1859, said company had on hand 389 State bonds, 301 of which were issued as early as June 4th, 1858. On June 30th, 1860, said company had on hand 303 State bonds, 201 of which had been issued as early as June 4th, 1858. Many other instances of a similar kind could be given where the the various railroad companies preferred to use their other means in ironing and equipping the first part of their roads, reserving their State bonds for future uses; but all parties agreed that the debt from the companies to the State arose as soon as the bonds were issued, and the companies paid the State the interest as

well on their bonds which were reserved, as upon those which were negotiated. According to complainant's theory, however, the lien belonged to the holders of the bonds, and these companies, as such holders, had a lien upon their own property to secure the payment by themselves, to themselves, of the bonds then in their own possession.

Again, under the general laws of Tennessee then, and now, in force, all mortgages and deeds of trust must be in writing and duly registered, or they are null and void as to existing or subsequent creditors of the makers. Code Tenn., secs. 2030, 2075.

The Constitution of Tennessee ordains that the Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land. Art. XI, sec. 8.

If the lien or mortgage upon the railroad belongs, as complainant contends, to the individuals who hold the bonds, the act of February 11th, 1852 would be unconstitutional, as suspending in their favor the general registry law, for this act of February 11th, 1852 provides that the lien shall exist without any deed from the company, and have priority without registration over all other claims against the company. But if, as respondents insist, the lien belonged exclusively to the State, the act aforesaid would be valid, as the State is not subject to the constitutional inhibition referred to above.

Respondents deny that the lien upon the railroads was reserved to "insure a sale or make a market for the bonds of the State;" they deny that it was done to create confidence in the public, or on the part of persons to whom said bonds might be offered for sale, or who might become the purchasers thereof, or as an assurance that each company would punctually pay the principal and interest of the bonds loaned to it.

In 1852 the taxable property of Tennessee was $177,420,305. The debt of the State then amounted to only $3,992,856.66, and the rate of State tax was only 11½ cents on the $100. The six per cent. bonds of the State were, as respondents are informed at par, and she had never defaulted upon any of her obligations. Her credit in the money markets needed no liens nor mortgages to support it. As conclusive evidence of this fact, and of the fact that the purchasers of the bonds loaned to railroads, did not look to the lien as an element of value, it will be shown upon the hearing that there was no difference in the money market between the price of the bonds loaned to railroads and those issued by the State to raise the capital of the Bank of Tennessee, or to build her State-house, to secure which there was no pretence of lien upon anything. Nor was there any difference in price between the bonds loaned to the most valuable railroads and those loaned to the most worthless. All State bonds stood alike, and alone upon the faith and credit of a sovereign State, whose financial honor up to that time, and in fact down to the late war, had been without a blemish.

Respondents deny that the copy of the internal improvement law as set out in the bill is either true or full; many errors and omissions have been detected by comparison with the original, and the same may be said of the portion of the act of February 21st, 1852, which purports to be copied into the bill.

Respondents admit that the State of Tennessee, by act of its General Assembly passed February 8th, 1854 (Acts 1853–4, p. 205), increased the amount of bonds to be issued to the railroad companies from $8,000 to $10,000 per mile; and provision was made for the issuance to them of similar bonds, to aid them in building bridges over certain large rivers. Said act was amendatory of the act of February 11,

1852, to establish a system of internal improvements in the State, and required that the increased amount of bonds should be issued "upon the terms and conditions mentioned in the act which it was intended to amend." The bridge aid bonds were to be issued upon the terms and conditions mentioned (except the second section) in an act passed Feb. 4, 1852, (Acts 1851–2, p. 110), entitled "An act to aid in the completion of the East Tennessee and Georgia Railroad," and also in the fifth and sixth sections of an act passed Feb. 26, 1852, (Acts 1851–2, p. 335,) entitled "An act to charter the Chattanooga, Blue Spring and Cleveland Railroad Company." The third section of said act of Feb. 4, 1852, provides that upon the issue of said bonds the said railroad and bridge, with all the appurtenances, etc., and the interest of the stockholders therein, and the tolls, issues and profits, should be, by force of said, act, vested in the State, "*for the security of the State against the payment of the bonds issued under said act and the interest thereon*;" and the State was vested with the right upon the issuance of said bonds to have and hold the entire road and bridge, with their appurtenances, and the tolls, issues and profits of the stock, "*for the security of the payment of said bonds and interest thereon accruing*," as a mortgage to secure the payment of the same, "*and said road and all its appurtenances of every kind and description shall be subject to any law that has been or may hereafter be passed for the enforcement of mortgages in like cases.*"

To explain what was meant by the words "*for the security of the State against the payment of the bonds and the interest thereon*," it will be seen that the second section of said act authorizes said company to charge passengers ten cents each for crossing the bridge, in addition to the regular charges; the company was required to render a

monthly account of said bridge tolls, and pay over the said sum monthly into some bank in Knoxville, taking the receipt of the bank therefor, "and the sum so deposited in the bank shall at all times be *subject to the check of the Comptroller of the Treasury for the payment of the interest on the said bonds*, and any overplus after the payment of the interest on said bonds *shall be passed to the credit of the company in discharge of the principal* due on any one or more of said bonds," and "*as soon as the interest and principal of said bonds shall be paid* the said company shall be released from the exaction of said additional charge." It is clear that the "security of the State against the payment of said bonds and interest" was to be attained not by the company paying them to the holders of the bonds, but by paying into the bank money enough to enable *the State* to pay them, which money was to be subject to the check of the State's Comptroller, and it was possible that the tolls from the bridge would pay the State the full amount of the bonds loaned, long before the bonds themselves were due from the State to the holders thereof.

Respondents admit that by an act passed February 17, 1854, the length of the sections, which it was necessary for the railroads to complete before obtaining bonds of the State, was decreased from twenty to ten miles after the completion of the first section of thirty miles. (See Acts 1853–4, p. 396.)

It is true that by act passed January 19, 1855, (Acts 1855–6, p. 93,) the foregoing act was amended so that the grading only, of ten mile sections, was required in lieu of the completion of said sections. The act of October 29, 1855 (Acts 1855–6, p. 18) was amendatory of the bridge law above mentioned, but has no general application.

Respondents admit that exhibit B to the bill gives correct copies of said acts of February 8 and

14, 1854, and January 19, 1855, but it gives no copy of act of October 29, 1855.

Respondents admit that there was delivered to the Memphis and Ohio Railroad Company, on account of their railroad, various internal improvement Bonds of the State of Tennessee. Respondents kept no record of the numbers, dates, or series, of the bonds issued to said company, and have no knowledge, information, remembrance, or belief in regard thereto. They cannot admit, and demand proof that the bonds described in the bill were the identical bonds issued to said company.

Respondents suppose that exhibit C. to the bill is a substantially correct copy of the State bonds and coupons that were loaned to the railroads under the act recited therein. Said bonds, to the amount of $2,001,100, were received by, or on behalf of, the Memphis and Ohio Railroad Company, through properly appointed officers, and were, by said company, negotiated and sold, in pursuance of law, to *bona fide* holders, but none were received prior to May 24, 1855. The proceeds of these bonds were applied as directed by the laws under which they were loaned to said company. Respondents have no knowledge, information, or belief as to how many of said bonds are now outstanding, nor in whose hands any of them are, nor whether the complainant is the owner or holder of any of them, nor as to whether complainant is the holder of any coupons attached to any of said bonds, nor as to when any of said coupons may have matured, nor what they amount to. Neither do respondents know how numerous the holders of said bonds are, nor where they reside. Upon all these points, so far as material, respondents demand strict proof.

Respondents deny that they or the said Memphis and Ohio Railroad Company, have failed to comply with the provisions of the general internal improvement law above referred to, though it may be that installments of interest on complainant's bonds and on bonds of other holders in like situation, and the coupons evidencing such interest, have not been paid by respondents nor by the State of Tennessee to the holders thereof. The law above referred to did not make it any part of respondents' duty, or of said Memphis, Clarksville and Louisville Railroad Company's duty, to pay such interest to the holders of said coupons.

Respondents admit that the State of Tennessee has been in default on the interest upon all her bonds since January 1, 1876. Respondents deny that complainant is entitled to the enforcement of any lien, or to the appointment of a receiver, upon or over any of respondents' property, for the purposes described in said statute, or for any other purpose whatever.

Respondents admit that by the fifth section of said act of February 11, 1852, it is provided that if any company, to whom the bonds of the State have been loaned, shall fail to deposit in the Bank of Tennessee at Nashville, at least fifteen days before the interest becomes due, from time to time, upon said bonds, an amount sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that said interest has been paid, or provided for, it shall be the duty of the Comptroller to report that fact to the Governor, and the Governor shall immediately appoint some suitable person or persons to take possession and control of said railroad, and all the assets thereof, and manage the same, and receive the rents, issues, profits, and dividends thereof, whose duty it shall be to give bond and security *to the State of Tennes-*

see, in such penalty *as the Governor* may require, for the faithful discharge of his or their duty as receiver or receivers, to receive said rents, issues, profits, and dividends, and pay over the same *under the direction of the Governor*, *toward* the liquidation of such unpaid interest. And said receiver shall continue in possession of said road, fixtures, and equipments, and run the same, and manage the entire road, until a sufficient sum shall be realized, exclusive of the costs and expenses incident to said proceedings, to pay off and discharge the interest as aforesaid, due on said bonds, which being done the receiver shall surrender said road and fixtures and equipments to said company. The Comptroller shall, from time to time, settle the accounts with the receiver, and the "*ballances*," (erroneously printed and enrolled as "ballance") shall be *deposited in the treasury of this State*. The comptroller is authorized, and it is made his duty, upon his warrant to draw *from the treasury* any sum of money necessary to meet the interest on such bonds, as may not be provided by the company *as provided for in this act*, and the comptroller shall make report thereof to the General Assembly from time to time."

As shown above, the interest which the statute intended to protect was the "interest *of the State*," and it will be seen from the section just quoted that the receiver is to be appointed upon the report of the comptroller *of the State*, by the Governor *of the State;* is to give his bond *to the State*, is to make his payments "*towards*" the liquidation of the unpaid interest under the direction of the Governor *of the State;* is to settle his accounts with the Comptroller *of the State*, and pay all balances into the treasury *of the State*. The rights now claimed for the bondholders are not noticed, and evidently were not then supposed to exist; but if, as complainant

insists, the rights of the bondholders are to be worked out through the State, then respondents submit that complainant must apply to the Governor of the State, and not to this court, for a receiver, and that the remedy pointed out in said act is exclusive. Respondents are at a loss to know why complainant has stated in his bill that the officials of the State of Tennessee named in said act for the execution of the duties pertaining to the statutory receivership, to-wit, the Comptroller and the Governor, claim to be bound by the subsequent acts of the General Assembly of Tennessee, passed in the years 1869 and 1870, and therefore that complainant is unable to obtain the action of said officials, or of the State of Tennessee. If said acts are constitutional, then complainant has no right to a receiver, either from the Governor or from this Court; but if said acts are not constitutional, it would be the Governor's duty to disregard them, and he would certainly do so if convinced that such was the case. At all events, the complainant cannot put the Governor nor the State in the wrong until he has first made a demand upon them to act. Respondents are informed, and so charge, that no demand or request has ever been made by complainant upon the Governor for the appointment of a receiver, and respondents rely upon this defense to so much of the bill as prays for a receiver, as fully as though it were specially pleaded. Respondents do not "pretend," though they certainly do claim, that the lien reserved by the aforesaid act of February 11, 1852, upon their property by the State, is satisfied and discharged, and that they are absolved from all the obligations which the Memphis and Ohio Railroad Company assumed by their acceptance and use of the bonds loaned them by the State, and this they claim, though it may be made to appear that some of such

bonds have found their way into complainant's hands, and the interest due thereon from the State may not have been paid. Respondents base this claim upon the following state of facts: As shown above, the act of February 11, 1852, by its fifth section, required each company to pay into the Bank of Tennessee, fifteen days before the interest became due, an amount sufficient to pay such interest, with exchange and commissions, and in default thereof the Governor was authorized to appoint a receiver. Under the seventh section each company was required, five years after its road was *completed*, to set apart annually *one* per cent. upon the amount of the bonds loaned to it, and use the same in purchasing bonds of the State of Tennessee, which the company was to *pay* into the treasury of the State, after assigning them to the Governor, who was to give the company a receipt therefor, and the bonds so paid were to be a credit, as between the State and the company paying them, upon the bonds loaned by the State to such company. If any of the bonds so paid in had been issued to the company paying them, they were to be not only credited to that company, but cancelled; if they had been issued for any other purpose they were to be held and used *by the State* as a sinking fund for the payment of the bonds issued to the company paying them in. It was calculated that by compounding the interest on said fund semi-annually, it would raise an amount sufficient to pay the bonds before they fell due from the State to the holder. If, however, these annual payments were not made by the company, *and in consequence thereof* said company should "fail or refuse to pay any of said bonds when they fall due," the Governor was to notify the Attorney General, who was required to file a bill against said company *in the name of the State*, and thereupon the Court should make all

such orders and decrees in said cause as might be deemed necessary by the Court to "secure" (erroneously printed "receive") payment of said bonds with interest thereon, and to indemnify the State of Tennessee against any loss on account of the issuance of said bonds, by ordering said railroad to be placed in the hands of a receiver, ordering the sale of said road, and all the property and assets attached thereto, or belonging to said company, or in such other manner as the Court may deem best for the interest of the State.

By the 12th section, the State of Tennessee expressly reserved the right to enact by the Legislature thereof, thereafter, all such laws as might be deemed necessary to protect the *interest of the State*, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of said act, but in such manner as not to impair the vested rights of the *stockholders* of the companies.

It will be noticed that the only mode "*provided in the act*" of February 11, 1852, "for the payment by said companies of said bonds with interest thereon," was by paying the interest into the Bank of Tennessee in advance of the maturity of the coupons, and by paying the principal by annual instalments into the treasury of the State. But while the State, under the 5th section, could appoint a receiver upon the first default on the *interest*, she had failed to reserve the right to appoint a receiver, or make a sale for default, in the annual payments which were intended to discharge the *principal* of the debts due from the companies to the State for the loan of the bonds. The receiver and sale provided for in the 6th section could not be resorted to until the bonds loaned to the companies had fully matured. To remedy these and other defects, the General Assembly, under the power reserved by the 12th section

of the act aforesaid, on February 21, 1856 (Acts 1855–6, pp. 144, 145. secs. 5, 6), passed an act requiring all railroad companies who had received, or might thereafter receive, bonds of the State under the act of February 11, 1852, to set apart annually *two* per cent. upon the amount of the bonds loaned them, instead of one per cent. as previously required; they were to commence this five years after they received the bonds, instead of five years after the completion of the roads, as previously required; instead of allowing the companies to use this fund themselves in the purchase of State bonds, as the first act had permitted them to do, they were now required to pay it over to the Treasurer, and the Governor, Comptroller, and President of the Bank of Tennessee, as a board of sinking fund commissioners, were to invest it in bonds of the State (*i. e.*, *any* bonds they might see proper to select), and the interest upon said bonds was to be reinvested in like securities. Of course, after this act deprived the companies of the right to use their annual payments in the purchase of bonds, it was impossible for them to purchase the bonds originally issued to them, even if they had known where to find them. The act of Februaay 21, 1856, further provided that if the companies failed or refused to make the annual payments of two per cent., the Attorney General should immediately file a bill for a receiver and sale, as provided by the 6th section of the act of February 11, 1852, but without waiting, as therein required, for the final maturity of the bonds.

The Comptroller's reports show that the sinking fund Commissions credited each railroad company with the annual amounts paid in, but in their investment thereof selected *any* bonds of the State that were offered for sale, Thus, from the Comptroller's report of 1859, p. 59, it seems that the Tennessee & Alabama R. R. Co., paid to the Treasurer

$6,400, which was invested in one bond *endorsed* by the State for the East Tennessee & Georgia R. R. Co., four State 5¼ per cent. bonds, and three State 5 per cent. bonds; but for what purpose the last seven bonds were issued is unknown. Not one of the bonds purchased with the money paid in by that company had ever been issued to it. The idea of the State at that time was to pay the interest on all the bonds that were paid into the railroad sinking fund, and that the accumulation would be so rapid as to certainly raise a fund that would pay the bonds by their maturity. In the Comptroller's report for 1859, p. 60, he states that $82,840.95, paid in by the railroads therein named, invested with accruing interest, had purchased bonds amounting to $109,750, which paid an annual interest of $6,417.50, or 7¾ per cent. on the investment. The idea is expressed in section 8th of an act passed February 20, 1856 (Acts 1855–6, p. 478), entitled "An Act for the Benefit of the Rogersville and Jefferson Railroad." It requires said company to *pay* into the treasury two per cent. per annum on the whole amount of the bonds issued to said road, "as a sinking fund to be invested and reinvested in State bonds, or other stocks, as provided by law, for the purpose of liquidating and paying off said bonds as they fall due."

The same idea is carried out in the act of February 18, 1856 (Acts 1855–6, p. 106, section 8th), amending an act establishing a State Agricultural Bureau. The State loaned said Bureau $30,000 of six per cent. coupon bonds, to enable the Bureau to purchase permanent fair grounds, and to erect permanent buildings near Nashville. This loan was made to encourage the agricultural interests of the State, *and no lien was retained on the property purchased.* But the Bureau was required to make interest payments into the Bank of Tennessee, and

payments upon the principal annually into a sinking fund, which was to be used *by the State* for the payment of the bonds loaned to the Bureau in precisely the same way that was provided by the act of February 11, 1852, in regard to railroads where a lien in favor of the State was retained.

On the 20th of March, 1860 (Acts 1859–60, p. 90), the policy of the State was changed in some respects. This act directs that the money or bonds that had theretofore been paid by the railroad companies to the sinking fund commissioners, together with the accruing interest thereon, should be passed directly to the credit of the party paying the same, and "be a release to said party for that amount on the debt due by them to the State of Tennessee." Said bonds were all to be cancelled, and if they were bonds "issued" (as distinguished from "endorsed") by the State, they were to be filed in the office of Secretary of State. On and after January 1, 1860, all railroad companies who had received bonds of the State, were required to pay 2½ per cent. annually on the amount of bonds issued to them, as a sinking fund. These payments could be made in cash, or in "like character" of bonds that may have been issued, or endorsed, by the State for said company at their face or par value. The State had *loaned* her own bonds to some of the internal improvement companies; she had *endorsed* the bonds of some of the other companies, and had *issued* her own bonds to pay for the State House, and for other purposes. The result was she had several different series of bonds issued under different laws, and maturing at different times. Series A. were five per cent. bonds, issued under act of 1838, maturing in thirty years; they were issued principally to pay for stock subscribed by the State in various turnpikes and railroads, and aggregated $1,893,000. Series B. were known as "white bonds, 6 per cent., issued under

the Act of February 11, 1852." Numbers 1 to 7,908 of this series mature in 1892, while numbers 7,909 to 11,806 do not mature until 1898. This series aggregated $11,806,000. Series C. were also known as "white bonds, six per cent., issued under the Act of February 11, 1852, and due in 1898." This series aggregated $1,878,000. Series B. and C. represented the State bonds loaned to the various railroad companies under said Act of February 11, 1852, before the war, and were of "like character" with each other, except that all of series C. mature in 1898, while some of series B. mature in 1898, and others in 1892. (See Comptroller's report, 1879, p. 130, *et seq.*) The sinking fund commissioners did not construe the Act of March 20, 1860, as meaning by the words "like character" that the bonds must have been the identical bonds loaned to the company paying them in; on the contrary they received from them any State bonds of like maturity, etc. To illustrate, the E. T. & Va. R. R. Co. paid in "fifteen of their own endorsed bonds," and "two regular State bonds;" the Memphis & Charleston R. R. Co. paid in "sixteen State bonds" and $2,960 in cash; the Memphis & Ohio R. R. Co. paid in "six State bonds;" and so of the McMinnville & Manchester R. R., and the Tennessee & Alabama R. R. Co. (See Comptroller's report, 1861, pp. 54, 55.)

Said Act of March 20, 1860, further provided that if the annual payments were made by the companies in money it should be invested by the commissioners in State bonds "of the same character" as those issued to such company, which bonds were to be cancelled. The sinking fund, when paid, was, in all cases, to be passed directly to the credit of the company, and be a release from that amount due by them to the State. Each company, instead of "providing" the semi-annual interest, as under the Act of 1852, upon the original amount of bonds issued to

it, was required to provide only for the interest on "the *amount* of bonds unpaid at the time said interest falls due. The Comptroller was directed to keep a regular account against each company, charging them with the amount of bonds originally issued to them by the State, and crediting them by the amount of sinking fund paid; and he was to furnish the treasurer statements of the amount due by each company on the first of June and December of each year, so that he could know how much interest each company had to pay. On the first of February, 1861 (Acts Extra Session 1861, p. 25), the General Assembly of Tennessee suspended for one year so much of the Act of March 20, 1860, as required the railroad companies to pay annually 2½ per cent. on the amount of bonds issued to them. On May 7, 1861, said General Assembly passed an act (second extra session 1861, p. 36) leaving it *discretionary* with the Governor to appoint a receiver or to permit the affairs of the several railroads to remain in the hands of the companies, as the interest *of the State might suggest.*

It will be seen that from the passage of the act of February 11, 1852, down to the late war, the State of Tennessee claimed the exclusive right to control what is called the sinking fund, to increase or suspend it, to change the character of the payments, the mode of investment, and the persons in control of the investment. That the State claimed the debt as due to her, and not to the bondholders, and though these various acts, and the reports of the Comptroller and of the sinking fund commissioners under them, were all public, no bondholder was ever heard to protest against the authority assumed by the State, or against the cancellation and destruction of securities, which the companies had paid into the sinking fund, and which fund, it is now claimed, was created to secure the payment of the State bonds by the companies to the holders.

The same may be said of the course that was pursued in regard to the payment of interest by the companies. No bondholder ever presented a State coupon to any railroad company for payment. No Tennessee railroad company had any banker, or other correspondent in New York, to pay the coupons on the State bonds loaned to it. No company ever retained in its possession the coupons that had been paid on the bonds loaned to it. In fact, few if any of the companies kept any memorandum of the numbers of the bonds issued to them, and it is perfectly safe to say that up to the time Comptroller Burch, in 1875, published his report, no one outside of the State had any idea as to what railroad the bonds issued before the war had been loaned.

By an act passed January 19, 1838, entitled "An Act to establish a State Bank to raise a fund for internal improvement, and to aid in the establishment of a system of education," the General Assembly of Tennessee established a bank "in the name and for the benefit of the State," under the name and style of the Bank of Tennessee. The capital of the bank was to be $5,000,000, the State to be the sole stockholder, and a large part of its capital was to be raised by the issuance and sale of State bonds. By the same act the State became a subscriber for one-half of the capital stock in all railroads and turnpikes in the State, its stock subscriptions to be paid by the issuance and sale of State bonds. The profits or dividends to be realized by the State from its stock in said bank and said internal internal improvement companies, were to constitute a fund for the redemption of all of said bonds, and the payment of the interest thereon, all of which was to be done by and through the Bank of Tennessee. If said dividends were insufficient for the purpose, then, by an act passed January 27,

1844, the Comptroller was required to draw his warrant upon the Treasurer in favor of any deficiency. As long as the Bank of Tennessee was in operation it was regarded as the fiscal agent of the State. All of its directors were appointed by the State; they were required to report to the State, and were constantly kept under its control. The State Treasurer kept none of the State funds in his own hands, but deposited all the revenues of the State in the Bank of Tennessee, and could only check for the same, on checks countersigned by the Comptroller. The Bank of Tennessee paid the interest on all the State bonds, without reference to the purpose for which they were issued. This is shown by the report of the Comptroller to the session of 1851–2, when the general internal improvement law was passed. See his report, p. 65. The Merchants Bank at New York, and the Bank of North America at Philadelphia, were the correspondents through whom the Bank of Tennessee paid the interest on the State debt. These correspondents would return the coupons to the Bank of Tennessee, by whom they were returned to the State. There was one account on the books of the Bank of Tennessee headed "Treasurer of Tennessee," which was credited by the revenues of the State deposited by the Treasurer, and by the dividends derived from the State stock in the bank, and the various internal improvement companies mentioned above, and was debited by the interest on the entire State debt paid by the Bank of Tennessee, and by such other sums as were drawn by the Treasurer under appropriations made by law. There was also an account on the books of the Bank of Tennessee headed "Interest paid on State bonds," the object of which was to show the exact amount paid on that account, but it shows nothing as to whom or for what purpose the bonds were issued upon which

such interest was paid. There was also an account headed "Railroad companies for interest showing the amounts and dates of all payments into the bank by the different companies, but it does not show that the payments were to be appropriated to the interest upon any particular bonds of the State, nor did the bank in fact know what bonds had been issued to any named railroad. The funds paid in by all the railroads were thrown together as a whole, and transferred either to the "Treasurer's general account" on the account headed "Interest on State bonds," which was but a sub-account of the Treasurer's and under his control. The moneys paid in by the railroads were sent with other funds to New York and Philadelphia, where they were paid out by the correspondents aforesaid upon coupons of the State, making no distinction btween the different bonds of the State. These correspondents kept no accounts with the railroad companies, and had no idea as to whom the bonds were issued, the coupons of which they were paying.

In the Treasurer's books an account was headed "Bank of Tennessee"—the reverse of the account kept under his name at the bank. There is an account headed "Interest on Capitol bonds," in which is shown the interest paid on the bonds issued to pay for the State House. There is also an account headed "Interest on Internal Improvement bonds." It shows the gross amount paid out on such bonds, but it does not show by whom the money was furnished, nor does it show the number or character of the bonds upon which the interest was paid. There are no separate accounts with the different railroads to be found on the Treasurer's books. With the exception of the distinction between "Capitol" and "Internal Improvement" bonds, the Treasurer made no difference between the various bonds of the

State, but treated them, as every one else did, as all equally the obligations of the State.

On July 1, 1861 the Legislature passed an act requiring the various railroad companies to pay the interest into the hands of the State Treasurer direct, (acts 2 ex. ses., 1861, page 53, sec. 11). And on Jan. 26, 1869, they passed an act requiring them to pay it to the Comptroller of the State, (Acts 1868–9, page 19). On Feb. 1, 1861, they passed an act suspending payments into the sinking fund for one year, (Acts 1 ex. ses., 1861, page 25). On Nov. 23, 1865, they passed an act continuing the suspension to Jan. 1, 1867, and thereafter increased it to four per cent., to be *paid* to the Treasurer in (any) bonds of a like character, (Acts 1865–6, pages 10, 11).

It will thus be seen that both as to the interest and sinking fund, every one had treated the debt due from the companies as due to the State, and the debt evidenced by the bonds as due from the State to the bondholders. The interest on the bonds loaned to the Memphis, and Ohio Railroad Company was not paid after July 1, 1861, and though the U. S. Circuit Court was open in Memphis after its capture by the U. S. army in June 1862, no bondholder ever claimed the right to a receiver for non-payment of interest. On May 5, 1865, the General Assembly, by joint resolution, appointed the Comptroller, Secretary of State, Attorney General, and Commissioner of Public Roads, a board to make a settlement with the Louisville and Nashville Railroad Company, and if a satisfactory settlement could not be obtained, the Governor was authorized to have instituted such legal proceedings as might be necessary to protect the *interest of the State*. (See Acts 1865, page 150). On the 18th of November, 1865, said commissioners reported to the Legislature (see Appendix 1865–6, page

233,) that they had effected a settlement; that the bonds loaned said company by the State amounted to $560,500, and the overdue interest thereon to $147,131,25; that the company had proposed to pay the entire principal in straight six per cent. coupon bonds of the State, and the interest in coupon bonds of the State then due; the commissioners say, "believing it to be manifestly for the interest of the State to call in this large installment of its indebtedness, and believing moreover that the company had *a right under the law regulating the sinking fund to pay off its entire indebtedness in the bonds of the State*, your commissioners accepted the proposal and executed to the company a receipt dated Nov. 17, 1865, for $707,631.25 in bonds and coupons of the State, being the total indebtedness of said company to the State of Tennessee, on account of the bonds of the State received in aid of the construction of said road and the bridge across the Cumberland river." Copies of said resolution and report are here filed as Exhibits Nos. A and B respectively. They were pulished in the Acts and Journal of that session, and no one ever controverted the right of the State to make the settlement until this bill was filed.

It further appears from the report of said Commissioners, that the last installment of interest, amounting to $16,815, was paid by the Louisville and Nashville Railroad Company into the Bank of Tennessee, on the 9th day of May, 1861; and though the fund was afterwards lost through the bad faith of the bank, that fact did not, in the opinion of the Commissioners, furnish any just or legal grounds for recourse upon the company, thus showing that the bank was regarded as the agent of the State and not of the railroad companies. This action of the State, acquiesced in by the State bondholders, was regarded as a precedent, and furnish-

ed the basis upon which all the debts due to the State from the various other railroads were afterwards settled. The legislation of the State after the war, in all substantial respects, followed the legislation which had been passed before the war, and conformed to the principles which had been established in the settlement with the Louisville and Nashville Railroad Company. By an Act passed February 18, 1867 (Public Acts 1866-7, pages 2, 3), all railroads were relieved from paying the sinking fund until January 1, 1870; and by an Act passed February 22, 1870 (Acts 1869-70, pages 85-6), the Nashville and Decatur Railroad Company were relieved from it until January 1, 1872. By an Act passed March 13, 1868 (Acts 1867-8, page 89, Sec. 4), a Board of Finance was created, and empowered to examine into, and settle, the sinking fund between all the railroads and the State. By an Act passed January 18, 1866, (Public Acts 1865-6, page 34), the railroad companies were required to pay their interest to the State Treasurer instead of to the Bank of Tennessee, as provided by the Act of February 11, 1852. By an Act passed March 13, 1868 (Public Act 1867-8, page 89, Sec. 5), they were required to pay the interest to the Comptroller of the State, and by Section 3 of the same Act, the duty of providing for the payment of the interest on the bonded debt of the State, which formerly rested upon the Bank of Tennessee, was transferred to a Board of Finance, who were also directed to settle with the railroad receivers—a duty which the Act of February 11, 1852, had imposed upon the Comptroller. Instead of allowing the Governor to select the receiver, as was provided by the Act of February 11, 1852, he was required by an Act passed October 26, 1869 (Acts 1869-70, page 4), to give a preference to the president of the railroad, who was to give a bond payable *to the State*, for the dis-

charge of his duty as receiver *of the State*, and that he would receive "the rents, issues and profits, and pay the same, after deducting the necessary repairs and running expenses of said road, *into the Treasury of the State.*" The Attorney General of *the State*, was, by an Act passed December 6, 1870 (Acts 1870-1, page 5), directed to institute suits *in the name of the State*, against the receiver and their sureties for any damages that *the State* had sustained because of their failure faithfully to discharge their duties as such receivers, and for their failure from time to time to settle with the Comptroller," or "for the rents, issues and profits that came to their hands as such receivers." By an Act passed February 24, 1870 (Acts of 1869-70, page 94, Sec. 3), as amended by Act of December 21, 1870 (Acts 1870 1, page 23), the railroad companies were allowed to pay the interest then due, or that might fall due by January 1, 1872, in past due bonds or coupons of the State. Under the Act of February 11, 1852, the State was only entitled to two directors, to be appointed by the Governor, in each company to which State aid was granted. By Act of March 7, 1867 (Acts 1866-7, page 143, Sec. 7), the number appointed were to be in proportion to the amount of aid received by the company in which they were appointed. By an Act passed February 4, 1870 (Acts 1869-70, page 72), the appointment of State directors was to be confirmed by the Senate; and whenever any railroad should "have liquidated its *indebtedness to the State*," the power to appoint such directors, on the part of the State, as well as the powers of such directors as had been previously appointed, were to cease. By an Act passed November 23, 1865 (Public Acts 1865-6, pages 11, 12), the Governor was directed to issue bonds of the State to pay off all the State bonds and interest then past due, or that might fall due January 1,

1866. The interest that should thus be paid by the State on bonds loaned to the railroad companies was to be charged up to them on the same terms and conditions of the original loans, and the State was to have the same lien upon the roads and their property as was given by the internal improvement laws referred to above, and in addition, was to have a lien upon their franchises to secure the payment of the principal and interest of the bonds authorized to be issued by said act. The railroad companies were to pay the interest on those bonds in the same manner, and under the same rules, regulations and restrictions as they were required to pay by the Act of February 11, 1852; and after January 1, 1867, they were to pay annually to the treasurer four per cent. on the amount of "*their indebtedness to the State*" as a sinking fund; "to be paid *in the bonds of the State* in a like character to those issued or endorsed" for them, the payments to continue "until the whole of their indebtedness is discharged."

Under this law the interest due on the bonds loaned to the Memphis and Ohio Railroad Company were funded, and charged up as a lien in favor of the State against the road.

By an act passed January 18, 1866 (Public Acts 1865–6, pages 33, 34), the State loaned an additional amount of bonds to various railroad companies named therein, to aid them in repairing their roads and bridges, and in addition to the lien reserved by the Act of February 11, 1852, "the *State* by this act reserved a lien upon the '*profits*' of the roads for the money thereby advanced for the repairing of the same"; which lien *the State* was to have the right to enforce, as provided in the internal improvement law of the State, if the companies should fail to pay the sinking fund and interest required by said act of January 18, 1866. The lien, thus reserved,

was expressly declared to be "cumulative of, and in addition to, the lien ordered by the Act of 1852," "which lien" is declared "to extend to, and cover the money or *bonds* to be advanced to said roads," under said act. The State here treats the loan of her bonds as exactly equivalent to a loan of money. Under this act $300,000 of bonds were loaned to the Memphis and Ohio Railroad Company (see Public Acts 1865-6, page 33). By an act passed December 7, 1867 (Public Acts 1867-8, pages 14, 16), the Governor was directed to issue State bonds to various railroads therein named, to aid in the reconstruction and re-equipment of their roads. The 16th section was in these words, "that these loans shall be made in a like manner, and under the same conditions imposed, by the internal improvement laws of the State," and section 15 "provided that if the several railroad companies, or either of them, to whom the bonds of the State have been loaned under *this* act, or *former* acts, shall fail for two consecutive years to pay the *interest* that may accrue upon the bonds loaned to them severally, then, and in that case, the Governor, Secretary of State, and Comptroller may, at their discretion, *sell said railroad track, rolling stock, etc.*, upon such terms and conditions as they may deem best to secure *the interest of the State*, and *shall retain of the proceeds of said sale the amounts loaned to said companies, and the interest due on the same, with expenses of said sale.*"

It will be seen that down to this point, the State of Tennessee claimed to be the absolute and exclusive owner of the debt due from the railroads on account of bonds loaned to them, and of the lien or mortgage given to secure said debt; that the lien had been enlarged so as to embrace not only the road and all the property owned by the company as incident to or necessary for their business, to-

gether with the stock of the individual stockholders (Act February 11, 1852), but also the franchises of the company (Act November 23, 1865), and the profits arising from the operation of the road (Act January 18, 1866). The State by successive legislation, had acquired the right to enforce her lien by the appointment of receivers and sales of the property in default of either interest or sinking fund, and these sales could be made by her own officers, without the necessity of applying to the Courts—the proceeds of the sales to be paid into her own treasury. No bondholder had ever entered any protest against this course of legislation, and the railroad companies, having accepted aid under the various acts, were of course bound by them.

The Memphis and Ohio Railroad Company owed the State $2,396,110. They met their interest in January, 1867, but failed to pay their interest for July, 1867. This authorized the State to appoint a receiver, and experience had taught that in every instance these political receivers had run the roads down, without ever reducing the indebtedness. They had injured both the State and the companies, and therefore were to be avoided by both if possible.

The Governor, however, felt bound to comply with the law, and appointed a receiver to take charge of the road. Said company was also heavily indebted for labor, materials and supplies. The earnings were insufficient to pay operating expenses, and additional means were needed to put the road in safe condition. If it had fallen into the hands of the State it would not have been kept in running order for any considerable length of time. The Louisville and Nashville Railroad Company being greatly interested in the efficient operation of said road as part of the Louisville and Memphis line, had already advanced to said

Memphis and Ohio Railroad Company $125,000—and then agreed to lease their road—to pay the interest on the State bonds to the State of Tennessee—and to pay the debts of said company incurred since the war in the reconstruction and operation of the road. Respondents were to reimburse themselves if possible from the earnings of the road, but if there should be a surplus of earnings it was to be paid over to the Memphis and Ohio Railroad Company.

In October, 1869, the debt of Tennessee was $37,590,027.08, of which about $30,000,000 were for bonds loaned to railroad companies, with funded interest thereon. The State's bonds ranged in New York in 1869, from 70 cents in January to 40½ cents on the dollar in December, there being no distinction between bonds loaned to railroads and any other bonds. On the 25th of February, 1869 (see Acts 1868-9, p. 50), the Legislature passed an act reciting that it was "desirable for the general welfare of the State that the State should be reimbursed the amounts advanced to the different railroad companies as fast as practicable," and enacting that *any railroad company* might "repay *any amount* of the *principal*," of their "indebtedness to the State" *at such times as might be practicable*, provided it was done prior to the maturity of the State bonds that caused said indebtedness." It was further enacted that *any person* might, with the consent of the company, pay any part of the indebtedness of such company. If the payments were made by the company they were authorized to issue their own bonds of equal amount and denomination, which bonds were to be a lien pro rata in amount and of equal validity and effect with the unretired part of the State's indebtedness. And if any outside person should pay any part of the debt, with the consent of the company, such

person was to be subrogated to the lien of the State in the proportion which such payment bore to the original amount of such indebtedness. It will be noticed that this act produced but two important changes in the previous law. No person outside of the companies had ever been authorized to undertake the payment of their debts, and one feature of this act was to give such persons this right, and to subrogate them pro rata to the State's lien, provided the consent of the companies was first obtained. The reason for this provision was, that if any company should, from want of credit, be unable to procure the bonds with which to make the payment, the State would not lose the chance of reimbursement, if any one else could be found who was willing to advance the bonds.

Under the previous law the companies were authorized to repay their indebtedness to the State in annual installments of four per cent. on such indebtedness; but this would require many years, and in the meantime the interests both of the State and companies would suffer. The principle had been conceded, in the case of the Louisville & Nashville R. R. Co., that a company had the right to pay off their *entire* indebtedness at any time; but there was no law authorizing a payment of any part of their indebtedness greater than the annual four per cent. payments, but less than the whole debt, and one object of the act of February 25, 1869, was to give them such authority, and to enable them to exercise it, by the issuance of their own bonds, to be secured by a lien co-equal in extent, and pro rata in amount, with that of the State. It was provided, however, that where the company had previously issued second mortgage bonds, the State bonds paid in should be of the "*same series*" as those loaned to the company. It was seen, upon reflection, that it could make no difference to the second mortgage bond-

holders whether the State bonds paid in were of the same series of those loaned to the company or not; and thereupon the act of January 20, 1870 (Acts 1869–70, p. 61), was passed, which authorized the company to pay in any of the legally issued six per cent. bonds of the State outstanding, without regard to series or number; and such payments, to the extent made, were to be a full discharge of the State's lien, whether they were the same bonds, or the same series of bonds, issued to the company or not. There is a *proviso* in the act *as printed*, that it "shall not be so construed as to allow the payment and satisfaction of debts created by bonds "*issued*" by the State, and upon which the State is "secondarily liable;" and it has been insisted that the State was only secondarily liable upon her bonds "issued" to the railroad companies. But by reference to House Journal 1869–70, p. 326, it will be seen that the word really intended was "*endorsed*," and not the word "issued," and that the *proviso* referred to bonds of such companies as the Nashville & Chattanooga R. R., which had been "*endorsed*" by the State, and upon which it had always been conceded that the State was only secondarily liable.

In accordance with the terms of their lease of the Memphis and Ohio Railroad, respondents paid to the State of Tennessee the interest upon the bonds loaned to said road. Said payments were made regularly each six months from July, 1867, to July, 1871. Each semi-annual payment amounted to $71,883.30, and they were made mostly in cash, though some were made in past due bonds and coupons of the State. During much of this time the State was in default upon the interest due on the bonds loaned to the Memphis and Ohio Railroad Company, and was using for other purposes the money which respondents were paying into the treasury to enable her to meet the interest on said bonds.

On the 25th of May, 1871, the Memphis and Ohio Railroad Company paid the State of Tennessee $2,468,376.60 in bonds and coupons of the State, in full of all claims and demands of said State against said company, and in full discharge and satisfaction of all liens upon the property, rights, franchises and privileges of said company originating in or created by the loan or issuance and delivery to said company of the bonds of said State under or by virtue of the act of the Legislature of said State, passed the 11th day of February, 1852, entitled "An act to create a system of internal improvement in this State," and under the acts amending the same, or any other acts of said Legislature. The Comptroller of said State executed and delivered to said company a receipt evidencing said payment, and a copy of said receipt is here filed, marked Exhibit C, and prayed to be taken as part hereof.

On June 1st, 1871, the said Memphis and Ohio Railroad Company executed a mortgage or trust deed upon their railroad property, rights and franchises, conveying the same to Junius B. Alexander, a citizen of New York, and John B. Smith, a citizen of Kentucky, to secure $3,500,000 of first mortgage bonds. Said mortgage was duly executed and registered, and the bonds are now outstanding in the hands of *bona fide* holders for value.

Respondents insist that the trustees in said mortgage or deed of trust are necessary parties, without whom no safe decree can be made; it is also submitted that if complainant's theory is correct, the State of Tennessee is also a necessary party, and respondents rely upon this defense as though the same were specially pleaded. Further answering, respondents admit that during the late war the railroad companies did not pay the interest on the bonds issued to them, and after the war most of them still continued in default in making interest

payments. The State of Tennessee was also in default during the greater part of that time, and the market value of her bonds had depreciated.

Respondents deny that any of the officials of the Louisville and Nashville or of the Memphis and Ohio Railroad Company ever conceived the project of avoiding any legal liability arising out of the loan of the State bonds to said Memphis and Ohio Railroad Company though it is true that they treated the lien on said railroad as the absolute property of the State, and did not recognize any trust as existing in favor of the holders of the bonds whose money the company had received. Respondents acted under the honest belief then, as now, that the lien did belong exclusively to the State, and if they have mistaken the law, their mistake was occasioned by the construction that all parties interested in it have placed upon the Internal Improvement Laws of Tennessee from 1852 down to the filing of the bill. Respondents have made heavy expenditures, and incurred weighty obligations on the faith that the contemporaneous construction placed upon the law for nearly thirty years was correct, and they respectfully submit that the complainant and the other holders of such bonds will not now be allowed to agitate a question which they waived at a time when they saw respondents acting upon the belief that it could not, and would not be made. Respondents rely upon the defense of *laches* and other matter of equitable estoppel as fully as though the same were specially pleaded.

After the Memphis and Ohio Railroad Company had paid off their entire debt to the State, as set forth above and mortgaged their road, respondents endorsed the $3,500,000 of bonds secured by said mortgage, and on October 9th, 1872, entered into formal articles consolidating the two companies as

stated above, the consolidation becoming bound for all the debts of the Memphis and Ohio Railroad. The articles of consolidation were duly registered in October, 1872, in all the counties in Tennessee through which the Memphis and Ohio Railroad ran.

On November 1st, 1873, respondents executed a mortgage on their main stem and branches, including the Memphis and Ohio Railroad, conveying the same to Henry F. Vail, a citizen of New York, and John B. Smith, a citizen of Kentucky, to secure $4,000,000 of bonds, $2,000,000 of which are now outstanding in the bonds of *bona fide* holders for value. Said mortgage was duly registered.

Respondents submit that said trustees are necessary parties to this suit, without whom no safe decree can be made, and this defense is relied on as fully as though specially pleaded.

During all this while, complainant, and others similarly situated, have stood by in silence, or what was even more deceptive, they have shown that they regarded the State of Tennessee as alone responsible by funding all their unpaid interest in other bonds of the State, under laws of the State authorizing it to be done. With the exception of some interest paid in 1867–8, and some paid in 1874–5, the State of Tennessee has paid no interest since the commencement of the late war, and the remainder of the interest has all been funded into new bonds of the State, except that which has matured since Jan. 1, 1876, and it has neither been funded nor paid. The State bondholders, having treated the State as their only debtor for seventeen years past, ought not now to be allowed for the first time to assert a lien upon property which has passed into the hands of others acting in good faith, and making heavy expenditures on account of it.

Respondents have no knowledge, information, or belief, that the railroad companies of Tennessee

originated the idea that the lien upon the railroads, reserved by the Internal Improvement laws, was the absolute property of the State; nor that they endeavored to induce the Legislature to proceed upon that basis assign and the lien upon each road, in consideration of the receipt by the State of an amount of its bonds from each company without regard to whether they were bonds loaned to the company delivering them to the State. On the contrary, as shown by the legislation referred to above, the State had at all times, from 1852, claimed the absolute and exclusive ownership of said lien and debt. Neither have respondents any knowledge, information, or belief, as to what railroad officials applied themselves to the procurement of the acts of February 25th, 1869, and January 2d, 1870; nor as to whether either of said bills were drafted by the agents of any such corporations. It is true that both of said bills were amended in the course of their passage, as is usual in such cases; and as it seems from complainant's bill that such amendments were made "to preserve the rights of the internal improvement bondholders," it is fair to assume that the bondholders "applied themselves to the procurement" of said amendments, with as much success as the railroads did to the body of the acts.

The State Comptroller, in his report in 1869, p. 50, suggested to the Legislature the propriety of selling a sufficient number of the railroads for bonds of the State to lessen the State's liabilities $8,000,000 or $10,000,000, he believing that such a reduction of the State's liabilities could be regularly and certainly met. His report in 1867, p. 67, shows that the railroads then owed the State $800,000 for interest due July 1, 1867, which the State had paid for them on the bonds loaned them. It was certain that if the delinquent railroads were placed in the hands of receivers no

good would result to any one. The Comptroller, in his report in 1867, states that the records of his office show that from the railroads then in the hands of receivers, scarcely a dollar had been received during the past fiscal year (p. 13). If the State had forced a sale of all the delinquent railroads, so large an amount of such property thrown upon the market, in the depressed financial condition of the country, would have sacrificed alike the interests of the companies and the State; and, through the State, would have injured the bondholders of the State. But by allowing the companies to pay their debts in any of the bonds of the State, and giving them a reasonable time in which to get the bonds, they were enabled to procure them at reasonable rates; and by reducing the aggregate debt of the State, they increased the ability of the State to pay, and appreciated the value of the State bonds that were left still outstanding after the railroad indebtedness was retired. By this wise policy the State enabled many weak companies to pay off their entire debts whose property, if pressed to a sale, would have brought but a fraction of its original cost. And by the reduction of her debt, through the sale of her railroad interests, the bonds of the State, which were quoted as low as 40½ in December, 1869, were quoted as high as 91½ cents in the dollar in March, 1874, at the New York Stock Exchange.

Respondents are informed that the Nashville and Decatur Railroad Company, in 1870, requested of the Hon. Luke Prior, a distinguished lawyer of Alabama, a written opinion as to the right of the State of Tennessee to release the lien reserved by the State under the internal improvement laws of Tennessee. An elaborate opinion was written by Col. Prior, which was concurred in by the Hon. E. H. East, of Nashville, who was then, and is now, one of the most eminent law-

yers of Tennessee. The object of asking the opinion was to place the question fairly before the moneyed markets of the world, where said company were trying to raise the means to buy the bonds to pay off their debt to the State. Respondents had nothing to do with procuring said opinion and knew nothing of any opinion of New York counsel to the same effect that was published at or about that time. It is true that the transaction, in all its entirety, was fully understood by said company, but respondents do not know that it was also understood by the purchasers of the new bonds, as the legislation under which they were issued was not referred to in the mortgage; though the opinion of Col. Prior was published to give information upon the subject.

Said company acted with perfect integrity of purpose, and respondents deny that they knew, or believed, that they "were engaged in an attempt to grasp any security or property" upon which the holders of internal improvement bonds had any lien. On the contrary, they believed then, and respondents believe now, that the lien belonged exclusively to the State; and they are of opinion that this belief was duly shared in by the bondholders themselves, from the fact that for nearly eight years after the State had surrendered the lien, the bondholders failed to enter any protest against its action.

And having fully answered, respondents pray to be hence dismissed with their reasonable costs.

RUSSELL HOUSTON,
ESTES & ELLETT,
ED. BAXTER,
Solicitors for Respondents.

STATE OF..... .....

COUNTY OF.....

Personally appeared before me.....
an acting.....
the undersigned E. D. Standiford, President of the Louisville and Nashville Railroad Company, and stated that the facts set forth in the foregoing answer are true to the best of his knowledge, information, remembrance and belief; and he also affixed the seal of said company to said answer.

Subscribed before me.....day of.....
1879.

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Exhibit A.

NUMBER XXXVIII. — JOINT RESOLUTION APPOINTING COMMISSIONERS TO SETTLE WITH THE LOUISVILLE AND NASHVILLE RAILROAD.

Resolved by the General Assembly of the State of Tennessee, That the comptroller, secretary of the State, attorney-general of the State, and commissioner of public roads of the State of Tennessee, be, and are hereby constituted commissioners on behalf of the State of Tennessee, to meet and make a settlement with the Louisville and Nashville Railroad Company, and make a report thereof to this session of the General Assembly, if practicable; if not, to the next session of the same,

Be it further Resolved, That if such settlement cannot be made by said commissioners, with said Louisvile and Nashville Railroad, as shall be satisfactory to them, the fact shall be made known to the governor of the State, and he may direct the attorney-general of the State to institute such proceedings against said company as may be necessary to protect the interests of the State.

WILLIAM HEISKELL,
Speaker of the House of Representatives.
SAMUEL R. ROGERS,
Speaker of the Senate.

Dated *May* 5, 1864.

Exhibit B.

SETTLEMENT WITH THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

NASHVILLE, TENNESSEE, *November* 18, 1865.

To the General Assembly of the State of Tennessee:

In obedience to a resolution of your honorable body, entitled "a resolution to appoint commissioners to settle with the Louisville and Nashville Railroad Company," adopted May 5, 1865, the undersigned, as commissioners on behalf of the State, have met the Hon. James Guthrie, president, and Mr. Willis Ranney, secretary of said company, at the State Capitol, for the purpose contemplated in the resolution.

The memorial upon which said resolution is founded, and which, it is said, sets forth the various matters of settlement, has not been furnished to the commissioners, but has been mislaid in one house or the other of the legislature. But from a statement of its contents by Mr. Guthrie, your commissioners are of opinion that the only matter legitimately referred to them, is the indebtedness of said company to the State on account of the aid furnished the company in the shape of bonds loaned to them, and the interest thereon.

It appears from the books of the secretary of State, that said company have, at different times, received the sum of five hundred and sixty thousand five hundred dollars ($560,500) of the bonds of the State, in aid of the construction of their road, and the bridge across the Cumberland, at Nashville. It appears from the books of the comptroller, that the interest on these bonds has been paid up to July 1, 1861. The interest accruing since that time amounts to one hundred and forty-seven thousand one hundred and thirty-one dollars and twenty-five cents ($147,131.25), making the entire indebtedness of said railroad company to the State, seven hundred and seven thousand six hundred and thirty-one dollars and twenty-five cents ($707,631.25). The principal, Messrs. Guthrie and Ranney, on behalf of the said company, proposed to pay over in straight six per cent. coupon bonds of the State, and the interest in coupons of the State now due.

Believing it to be manifestly for the interest of the State to call in this large installment of its indebtedness, and believing, moreover, that the company had a right, under the law regulating the sinking fund, to pay off its entire indebtedness in the bonds of the State, your commissioners accepted the proposal, and executed to the commissioners, on behalf of the company, the following receipt, a duplicate of which is retained in the office of the comptroller:

NASHVILLE, TENNESSEE, *November* 17, 1865.

We, the undersigned, commissioners appointed by the General Assembly of the State of Tennessee, by joint resolution adopted May 5, 1865, "to meet and make settlement, on behalf of the State, with the Louisville and Nashville Railroad Company," have this day met and settled with the Hon. James Guthrie, president, and Willis Ranney, secretary of said company, and have received from them five hundred and fifty-one coupon bonds of the State, for one thousand dollars each ($551,000), nine thousand five hundred dollars ($9,500) in coupons of the bonds of the State now due; also, one hundred and forty-seven thousand one hundred and thirty-one dollars and twenty-five cents ($147,131,25) in coupons of the bonds of the State, in payment of interest due from said company, accruing since July 1, 1861; making in all, seven hundred and seven thousand six hundred and thirty-one dollars and twenty-five cents, being the total indebtedness of said company to the State of Tennessee, on account of the bonds of the State, received in aid of the construction of said road, and the bridge across the Cumberland River.

Given under our hands, this 17th of November, 1865.

A. J. FLETCHER, *Sec'y of State.*
S. W. HATCHELL, *Comptroller.*
T. H. CALDWELL, *Att'y-General.*
A. W. HAWKINS, *Com. of Roads.*

The bonds and coupons mentioned in said receipt are deposited with the comptroller of the State, and a list of the numbers and amount of the coupons is filed in the office of the secretary of State.

From the statement of Mr. Guthrie, your commissioners are of opinion that the other matters contained in the memorial, grow out of the consolidation of said road with the Edgefield and Kentucky road, by the acts of December 1, 1855, and December 3, 1859, and should be settled by the two companies, unless the latter road should fall permanently into the hands of the State. At any rate, the adjustment of these matters has been waived for the present by consent.

The last installment of interest, amounting to sixteen thousand eight hundred and fifteen dollars ($16,815), was paid by said company into the Bank of Tennessee, on the 9th day of May, 1861, as appears from their receipt. This was two days after the adoption of the Secession Ordinance; but as the law required the payment to be made to the bank, and as your commissioners can not see that the status of the bank was changed at that early day, they consider the

payment legal. The fact that the fund was lost by the bad faith of the bank, does not, in the opinion of your commissioners, furnish any just or legal grounds for recourse on the company.

Respectfully submitted.

A. J. FLETCHER, *Sec'y of State.*
S. W. HATCHELL, *Comptroller.*
T. H. CALDWELL, *Att'y-General.*
A. W. HAWKINS, *Com. of Roads.*

Exhibit C.

COMPTROLLER'S OFFICE,

NASHVILLE, TENN., May 25, 1871.

Received of the Memphis and Ohio Railroad Company, two million four hundred and sixty-eight thousand three hundred and seventy-six dollars and sixty cents ($2,468,376,-60) in the bonds of the State of Tennessee, with the first coupon due July 1, 1869, and all other coupons hereafter to fall due, thereto attached, and in other past due coupons of the State in full of all claims and demands of said State against said company, with and including interest on the same to the first day of July, 1871, and in full satisfaction and discharge of all liens upon the property, rights, franchises and privileges of said company originating in or created by the loan or issuance and delivery to said company of the bonds of said State, under or by virtue of the act of the Legislature of said State, passed the 11th day of February, 1852, entitled "An act to create a system of internal improvement in this State," and under the acts amending the same, or any other acts of said Legislature. And said company agrees if, in the examination of the bonds and coupons so paid in, any are found that the Legislature have declared to be illegally issued, to receive the same and make the amount so found good to the State.

ED. R. PENNEBAKER,
[L.S.] *Comptroller of Tennessee.*

U. S. Circuit Court,

SIXTH JUDICIAL CIRCUIT.

WESTERN DISTRICT OF TENNESSEE.

CALVIN AMORY STEVENS, on behalf of the holders of Internal Improvement Bonds of Tennessee issued to the MEMPHIS AND OHIO RAILROAD COMPANY,

vs.

THE LOUISVILLE, NASHVILLE AND GREAT SOUTHERN RAILROAD COMPANY.

In Equity.

The repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that he will aver and prove his said bill to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and

5 insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true, all which matters and things this repliant is and will be ready to aver and prove as this honorable Court shall direct, and humbly prays as in and by his said bill he has already prayed.

E. L. ANDREWS,

6 *Solicitor for Complainant.*

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Circuit Court of the United States.

Sixth Judicial Circuit.

Western District of Tennessee.

IN EQUITY.

CALVIN AMORY STEVENS, who sues on behalf of himself and other holders of Tennessee State Bonds, issued to the Memphis and Ohio Railroad Company,

vs.

The Louisville and Nashville Railroad Company.

ANSWER AND CROSS-BILL OF JOHN B. SMITH.

MATTHEWS, RAMSEY & MATTHEWS,
Solicitors.

STANLEY MATTHEWS,
Of counsel.

The answer of JOHN B. SMITH, a citizen of the State of Kentucky, to the Bill of Complaint of CALVIN AMORY STEVENS, Complainant, who sues on his own and on behalf of all holders of Internal Improvement Bonds of Tennessee, issued to the Memphis and Ohio Railroad Company, against the Memphis and Ohio Railroad Company and the Louisville & Nashville Railroad Company, sued by the name of the Louisville, Nashville & Great Southern Railroad Company, Defendants.

And now comes the defendant, the said John B. Smith, a citizen of the State of Kentucky, and by leave of Court, voluntarily enters his appearance herein, by Matthews, Ramsey & Matthews, his solicitors, and reserving and saving all benefit or advantage of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto as to so much thereof as this defendant is advised it is material to make answer thereto, answering, says:

1. That this respondent hereby adopts the answer to said bill heretofore filed by his co-defendant, The Louisville and Nashville Railroad Company, and all the matters and things set forth, as fully as if the same were here particularly repeated, and affirms and declares the same, and each allegation therein, to be true in substance and in fact, and relies upon the same as a complete and perfect answer and defense to said bill.

2. And this respondent further says, in addition thereto, that on the first day of June, one thousand eight hundred and seventy one, the Memphis and Ohio Railroad Company, of the first part, executed

and delivered its certain deed of indenture of that date to and with this respondent, of Louisville, in the State of Kentucky, and Junius R. Alexander, of the City of New York, parties of the second part, wherein it was recited that it had become and was necessary for the said party of the first part to raise money to be used for the purpose of meeting and discharging debts duly contracted in the course of its legitimate business and owing by it, and to be used for other lawful purposes authorized to it by its charter and by the laws of the State of Tennessee, and to such end said party of the first part had determined, in pursuance of the powers conferred upon it by the statutes of the State of Tennessee, to issue and sell the bonds of said company to the amount of three million five hundred thousand dollars, with the privilege to the holders of such bonds of receiving in payment of principal and interest thereon respectively an equivalent therefor in sterling money of Great Britain, as thereinafter specified, and thereupon and thereby to raise the money which so was necessary for it upon the means of the company by proper and suitable conveyance—that is to say, upon the credit and security of said bonds of the said indenture of mortgage and the property thereby mortgaged, as was authorized by the laws of the State of Tennessee, and particularly by a certain act of the legislature of that State, passed December 16, 1853. And also that the said company had thereupon caused to be prepared and made ready for issue and sale for the purposes aforesaid, its certain three thousand five hundred bonds for one thousand dollars each, with the privilege of the holder of receiving for principal and interest respectively an equivalent in sterling money as aforesaid, the said bonds being numbered consecutively from number one to number thirty-five hundred, both inclusive, bearing

date on the first day of June, eighteen hundred and seventy-one, and payable in gold coin of the United States on the first day of June, in the year nineteen hundred and one, which bonds bear interest from their date at the rate of seven per cent. per annum in like gold coin, payable semi-annually on the first day of June and December in each year, in accordance with the coupons for such interest to said bonds annexed, and which coupons are numbered correspondingly to the bonds to which they are respectively attached, with likewise a consecutive numbering of the coupons in the order of maturity, and which bonds and coupons respectively are in a form therein set out; and also, that in order to raise the amount of money which was required by the necessities of the company for the purposes aforesaid, it was necessary for said company to make and sell its bonds as aforesaid to the said amount of three million five hundred thousand dollars, and also that the board of directors of the said, The Memphis and Ohio Railroad Company, at a meeting had on the seventeenth day of May then last past, had duly resolved to issue and sell, in order to raise money for the purposes aforesaid, the above-mentioned three thousand five hundred bonds for one thousand dollars each, with such coupons attached thereto, with the privilege to the holder of receiving for principal or interest respectively an equivalent in sterling money as aforesaid, and to secure the payment thereof by said indenture of mortgage to be executed by said company under its corporate seal, with the signatures of its president and secretary, and that in order to secure the due and punctual payment of the above-mentioned three thousand five hundred bonds for one thousand dollars each, and of the said coupons for the interest thereon, or at the holder's option, such equivalent in sterling as aforesaid, according to the tenor and

effect of such bonds and coupons respectively, to the persons or corporations who, at the time being, shall be the owners and holders, or lawfully entitled to demand and receive payment of the same respectively, equally in respect of all the said bonds, without preference or privity of one over another, by reason of priority in the time of issue or negotiation thereof, or otherwise; and, in consideration of the premises, and for other valuable considerations paid, the Memphis and Ohio Railroad Company did thereby grant, bargain, sell, alien, remise, release, convey and confirm unto the said parties of the second part, as trustees, their heirs and assigns forever, and to their successors in said trust and assigns, all and singular the railroad of the said party of the first part, extending from a point in Memphis, in the State of Tennessee, to and into Paris, in the same State, a distance of about one hundred and thirty-one miles, with all the track or roadway thereof, and the rails thereon laid, and other structures thereon, and all the lands, rights, easements and privileges acquired, or to be acquired, for the purposes of or in connection with said railroad, and all the rights, privileges, and franchises whatsoever which the party of the first part was possessed of or entitled unto, or which it should at any time thereafter acquire or become possessed of or entitled to, in connection with the use, enjoyment, maintenance, or operation of the said railroad, or any part thereof, as therein more particularly described, to have and to hold the same, unto the said parties of the second part, as trustees aforesaid, and their heirs and assigns and successors in said trust, and assigns, but as trustees, nevertheless, for the use of the several persons who shall be or become the owners or holders of or lawfully entitled to demand and receive payment of the said thirty-five hundred bonds, and the said coupons attached thereto, equally,

pro rata, and without preference or priority of one over another, and upon the trusts, uses, and purposes, and subject to the conditions and provisions thereinafter expressed and declared. A copy of which indenture of mortgage or deed of trust is hereto attached and made part hereof, and marked Exhibit "No. 1."

This respondent says, that said indenture of mortgage was duly registered according to the laws of the State of Tennessee, and was and is a valid and effectual conveyance for the uses and purposes therein mentioned.

3. This respondent further says, that all said thirty-five hundred bonds, described in and secured by said mortgage, were duly issued, and by said railroad company negotiated and sold, to *bona fide* purchasers, for full value, without notice or knowledge of the claim now asserted, in his bill, by the complainant, on behalf of himself and other holders of bonds of the State of Tennessee, issued to the Memphis and Ohio Railroad Company, and in the full assurance and confident belief that the lien reserved on account thereof by the State of Tennessee, under the internal improvement laws, had been, in the manner and under the circumstances set forth in the answer herein of the Louisville and Nashville Railroad Company, fully satisfied and discharged; and this respondent says, that the proceeds of the sale of said bonds, which were indorsed, before negotiation, by the Louisville and Nashville Railroad Company, were used to replace advances made by the said company for the Memphis and Ohio Railroad Company, and particularly for the purchase of the bonds of the State with which the indebtedness of said railroad company to the State was paid, and the lien therefor discharged, and afterward the Memphis and Ohio Railroad Company was consolidated with the Louisville and

Nashville Railroad Company, and the said mortgaged property, subject to the said mortgage to this respondent and the said Alexander, became vested in the Louisville and Nashville Railroad Company.

4. And this respondent further says that on or about the first day of November, 1873, the Louisville and Nashville Railroad Company, a corporation authorized thereto by the laws of Kentucky and Tennessee, executed and delivered its indenture of mortgage of that date to Henry F. Vail, a citizen of the State of New York, and to this respondent, wherein it was recited that said company needed and desired to raise money for the purposes authorized by said laws, and that, to that end, the president and directors thereof, at a meeting duly held on the 2d day of October, 1873, had resolved that the president of said board have prepared and executed the coupon bonds of the company, not to exceed, in amount, four millions of dollars; three thousand of said bonds to be for one thousand dollars each, and two thousand of them to be for five hundred dollars each, and numbered from 1 to 5,000, to bear date the 1st day of November, 1873, and payable on the 1st day of November, 1883, in gold coin of the United States; to be signed by the president and countersigned by the secretary, with the seal of the company affixed, to bear interest at the rate of seven per cent. in like gold coin, payable semi-annually, on the first day of May and November in each year, upon the presentation and delivery of the proper coupons at the agency of the company in the city of New York, and that he execute, in the name and in behalf of the company, to be countersigned and sealed as aforesaid, a mortgage of even date with said bonds, on the property, rights, and franchises of the company in the States of Kentucky and Tennessee, and subject to the existing

mortgages of the company, and the Memphis and Ohio Railroad Company over the same, to secure the payment of the principal and interest of said bonds, containing such terms and stipulations as may be deemed best to secure the same, as provided by the laws of Kentucky and Tennessee. The coupons to be attached to said bonds, to be signed either by the secretary or authenticated by the engraving of his proper signature thereto, which latter should be sufficient to bind the company; and the said bonds to be numbered from 1 to 5,000, inclusive; and that the said company, in pursuance of said authority, had executed, under its corporate seal, and signed by its president and secretary, and made ready for sale, and was about to issue and negotiate five thousand of its coupon bonds, numbered as aforesaid; three thousand of which were for one thousand dollars each, and two thousand for five hundred dollars each, the form of which was therein described; and thereby, in order to secure the due and punctual payment of the before-mentioned five thousand bonds, and the said coupons for interest thereon, to the persons or corporations who, at the time being should be the owners thereof, equally in respect of all said bonds, without preference or priority of one over another, by reason of priority in the time of issue or negotiation thereof or otherwise; in consideration whereof, and of one dollar paid, the said Louisville and Nashville Railroad Company granted, conveyed, mortgaged, transferred, and set over to the said Henry F. Vail, and this respondent, parties of the second part, and their successors, as trustees, of the common and equal benefit of all those who might be the holders of such bonds:

First. The main line of the railroad of said party of the first part, between the city of Louisville, in the State of Kentucky, and the city of Nashville, in

the State of Tennessee, and in said cities respectively, the same being about one hundred and eighty-five miles long.

Second. The Bardstown branch of said railroad, extending from said main line to and within the town of Bardstown, in the State of Kentucky, the same being about seventeen miles long.

Third. The Lebanon or Knoxville branch of said railroad, extending, as then completed, from said main line to and into the town of Livingston, in the State of Kentucky, a distance of about one hundred and ten miles, and also said branch as the same shall be extended or completed until it shall reach the Tennessee State line, being in entire length about one hundred and seventy-two miles.

Fourth. The Richmond branch of said main line (and being also a branch of said Lebanon or Knoxville branch), extending from and in the town of Stanford to and into the town of Richmond, in the State of Kentucky, a distance of about thirty-three miles.

Fifth. The Memphis branch of said railroad, extending from said main line to and into the city of Memphis, in the State of Tennessee, which includes all that part of said first party's railroad, from its main line to the line dividing the States of Kentucky and Tennessee, in the direction of the city of Memphis, a distance of about forty-seven miles, and that part of said first party's railroad extending from said dividing line between the States of Kentucky and Tennessee to and into the town of Paris, in the State of Tennessee, a distance of about eighty-three miles, the same being formerly known as the Memphis, Clarksville and Louisville Railroad, and also that part of said first party's railroad extending from and into said town of Paris to and into the city of Memphis, in the State of Tennessee, a distance of about one

hundred and thirty-one miles, and formerly known as the Memphis and Ohio Railroad, with all the roadway and track of said railroads and branches, and the rails thereon laid or to be laid, and the structures thereon, and all the lands, rights, easements, privileges, and franchises, acquired or to be acquired, and all other appurtenances and property therein described, and the income and profits thereon arising, but subject to the lien of said mortgage and deed of trust of April 1, 1868, to James Punnett and James B. Alexander, trustees, hereinbefore set forth, as to so much of said railroad and branches, and property as is in said last mentioned mortgage described; and also subject to the lien created by a mortgage on so much of said railroad line and appurtenances, and other property in the State of Tennessee, extending from the city of Memphis to the town of Paris, in said State, and formerly known as the Memphis and Ohio Railroad, made by the Memphis and Ohio Railroad Company, on the 1st day of June, 1871, to this respondent and James B. Alexander, as trustees, to secure the payment of thirty-five hundred bonds for one thousand dollars or two hundred pound sterling each, with coupons attached and numbered consecutively from one to thirty-five hundred, inclusive, duly recorded in the proper offices in the counties in which said railroad lies, and also subject to the lien created by an indenture of mortgage on so much of said company's railroad line and appurtenances, rights, franchises, income, etc., in the State of Tennessee, as extends from the town of Paris to the line which divides the States of Kentucky and Tennessee at the point where the same is crossed by the Memphis branch of said company's railroad line, the same being formerly the Memphis, Clarksville and Louisville Railroad, made by said party of the first part on the 15th day of July, 1872, to this respondent and James B. Alexander, as trustees, to

secure the payment of twenty-five hundred bonds, each for two hundred pounds sterling money of Great Britain, and numbered consecutively from one to twenty-five hundred, inclusive, and duly recorded in the proper offices in the city of Louisville and in the counties in which said railroad lies, the said grantees, as trustees, to have and to hold the said granted and mortgaged premises upon the trusts in said deed contained, a copy of which, as a part hereof, is hereto attached and marked Exhibit No. 2.

And this respondent further says that soon after the execution and delivery of this deed of trust or mortgage, the Louisville and Nashville Railroad Company negotiated, issued, and sold, of the bonds thereby secured, two millions of dollars, for full value, to innocent purchasers in good faith, in the confidence and belief that the lien of the said mortgage, securing the payment and interest of the said bonds, was subject only to the prior liens expressly named therein, and without any knowledge or notice whatever of the claim set up by the complainant in the bill of complaint, or that any such claim was made by him, or by any other holder of Tennessee State bonds, issued originally under said internal improvement acts or amendments thereto, either to the Louisville or Nashville Railroad Company, or to the Memphis and Ohio Railroad Company, or to the Memphis, Clarksville, and Louisville Railroad Company, and in full assurance and belief that the original lien reserved under the laws of Tennessee to said State, on account of the loan of its bonds to said railroad companies, had been legally and in good faith paid off, satisfied, and discharged.

5. This respondent further states that he admits that there was delivered to the Memphis and Ohio Railroad Company, on account of their railroad, various Internal Improvement bonds of the State of

Tennessee, but how they were numbered, and of what dates and series, nor in what form, this respondent has no knowledge, information or belief, and cannot admit, and demands proof that the bonds described in the bill are the identical bonds issued to said company, nor does he admit that Exhibit C to the bill is a correct copy of any of said bonds and coupons, but demands proof of the same.

This respondent says that said bonds, to the amount of one million five hundred and eighty-two thousand dollars, were received by or on behalf of the Memphis and Ohio Railroad Company, either through its own officers, or by receivers in possession of its railroad, under appointment of the governor of the State, and were by said company, or by said receivers, negotiated and sold, in pursuance of law, to *bona fide* holders, but none prior to May 24, 1858, and the proceeds of said bonds were applied as directed by the laws under which they were issued. This respondent has no knowledge, information or belief as to how many of said bonds are now outstanding, nor in whose hands any of them are, nor whether the complainant is the owner or holder of any of them, nor as to whether complainant is the holder of any coupons attached to any of said bonds, nor how numerous the holders of said bonds are nor where they reside. Upon all these points, so far as material, the respondent demands strict proof.

6. This respondent admits that the State of Tennessee has failed to pay the interest accruing on its outstanding bonds since the 1st day of January, 1876, having failed to pay the coupons falling due on the 1st day of July of that year; but says that all coupons on its bonds, falling due prior to that date, have either been paid by the State, or satisfied by being funded in other bonds of the State, as will hereafter more particularly be stated and shown;

and this respondent denies that the Memphis and Ohio Railroad Company did not pay to the State the interest accruing upon its indebtedness to the State, on account of the said bonds, but on the contrary thereof says that said payments of interest were regularly made by the Louisville and Nashville Railroad Company, then in possession of the Memphis and Ohio Railroad as lessee thereof, every six months, from July, 1867, to July, 1871, each semi-annual payment amounting to $71,883.30, and made mostly in cash, though some were made in past due bonds and coupons of the State.

7. These respondents admit that the General Assembly of the State of Tennessee, on the 11th of February, 1852, passed an Act entitled "an Act to establish a system of Internal Improvements in this State," and various other statutes amendatory and supplementary thereto and in execution thereof, but does not admit that the copies thereof set out in the bill are correct, or that those referred to therein are all that are material to be considered, and denies that the construction thereof claimed by the complainants in said bill is the true and rightful interpretation thereof, and particularly that the same created any debt or obligation from the said Louisville and Nashville Railroad Company to the holders of any bonds of the State of Tennessee, loaned to said company by the State, and sold and put in circulation by said company, or that the lien reserved and declared in said laws was reserved and declared in favor of the holders of the bonds of the State, or in anywise inured to them, either by the terms of the said statutes, or in virtue of any agreement or contract with the holders of said State bonds, expressed or implied, made by and between them and said railroad company or the State of Tennessee, or otherwise; and on the contrary thereof, this re-

spondent insists that the said statutes, according to the true meaning thereof, are laws of the State of Tennessee, defining, declaring, and regulating the duties and obligations toward said State alone, of the several railroad companies, to each of which it loaned its bonds, for the uses and purposes therein named, and reserving and securing to the said State, and to it alone, its rights and interests, as against said railroad companies, in consequence of the loan to each thereof of any of its own bonds; and that the only contract to which the holders of the bonds of the State of Tennessee are parties, or in which they have any legal or equitable or beneficial interest, is directly with the State, and is contained only in the bonds themselves, whereby they agreed for the payment of the interest and principal, as therein stipulated, to look alone to the fath and credit of the State, thereby pledged for the same.

And this respondent further says, as a matter of fact, that all bonds of the State of Tennessee loaned to the said railroad companies under said acts, were sold in the market as straight Tennessee State bonds; that is to say, as other bonds of the State of Tennessee, issued upon the mere credit of the State, and without other security, and on which the State was liable as principal, and as distinguished from bonds of railroad companies, indorsed or guaranteed by the State, and on which both the railroad company and the State were bound, the former as principal, the latter as surety; and this respondent says that, in consequence of this difference, and in virtue of said bonds being what was known in the market by the public as straight Tennessee bonds, the said bonds sold before the war, commanded a premium in the market, and were sold at or above par, while bonds of other descriptions, on which the railroad companies were bound as principals and the State of Tennessee as surety, and secured by a mort-

gage lien upon the railroad property, directly to the holders of the same, could not be sold except at a very considerable discount; and this respondent insists that it was to meet this condition of the market, which was well known, and to avoid and prevent the loss occasioned by this distrust of bonds, on which railroad companies were bound as principals, and the State merely as surety, that the legislation introduced by the acts of January 15 and February 11, 1852, was shaped so that the bonds of the State to be issued under it should rest alone, without other security, upon the public confidence in the ability and willingness of the people and government of the State of Tennessee to meet and pay at maturity all their obligations and debts, as, at that time, they always had done, and as at that time it was believed they always would continue to do; and all the provisions in said legislation looking to security for the payments to be made by the railroad companies were arrangements to which the State and the railroad companies alone were parties, and for the sole indemnity of the State against loss on account of its liability for this interest and principal of its own bonds, issued and loaned to the said several companies.

And this respondent says that it was not in the contemplation of the parties, at the time of the passage of said internal improvement acts of 1851, 1852, nor at the several times when the bonds of the State were issued, in pursuance thereof, to the several railroad companies mentioned therein, nor when any of said bonds were sold by said railroad companies, that the State of Tennessee would ever fail promptly and punctually to pay the current interest on said bonds; and that, consequently, it is inadmissible now to construe said acts as if they contained provisions looking to such contingency, and providing against it, more especially

as if such construction had been put on said laws at the time of said negotiation, it would have been evidence of such distrust in the good faith or ability of the State to meet its obligations as would materially have affected the market value of said bonds, if not prevented their sale; and, on the contrary thereof, this respondent says that so little room was there for such a construction of these acts, that express provision was therein made, in the 5th section of the act of February 11, 1852, whereby it was made the duty of the comptroller, and he was thereby authorized, "upon his warrant, to draw from the treasury any sum of money necessary to meet the interest on such bonds, as may not be provided for by the company, as provided for in this act; and the comptroller shall report thereof to the General Assembly from time to time."

And this respondent further says that whatever were or may be supposed to have been the rights of the holders of the State bonds, issued under said act of February 11, 1852, after sale thereof by the railroad companies, to which they had been loaned and issued, they were taken subject to the provisions of the 12th section of said act, whereby it was enacted "that the State of Tennessee expressly reserves the right to enact, by the legislature, hereafter, all such laws as may be deemed necessary to protect the interest of the State, and to insure the State against any loss, in consequence of the issuance of bonds under the provisions of this act, but in such manner as not to impair the vested rights of the stockholders of the companies."

And that all the subsequent acts, amendatory of said act of February 11, 1852, and supplementary thereto, particularly the said acts of 1869, 1870, for the retirement of the State debt, and for the sale of delinquent railroads, and all acts and transactions under them, whereby settlements were effected be-

tween the State and said several railroad companies, and the indebtedness of the latter, arising in consequence of the loan to them of the bonds of the State was liquidated and satisfied, and the lien to secure the same discharged, were strictly and fairly in execution of the intentions and purposes of the original act, and of the power reserved to the State in the 12th section thereof.

And this respondent further says that said act of February 11, 1852, not only recognizes the lien thereby reserved and created, as belonging to the State in law, but also in equity, for its own sole and exclusive benefit, to be dealt with, enforced, or discharged, according to its own discretion, and with a view only to its own interests, as its own property, security, and indemnity; and also that the plan provided in said act for the gradual but ultimate payment and extinction of the obligations of the railroad companies under the same, in making provisions for a sinking fund, according to the terms of the 7th section thereof, explicitly admitted the principle of a payment by said railroad companies, on account thereof, of any bonds of the State, whether the identical ones issued to the company or not, and guaranteed to each of said railroad companies, as a right, the opportunity to pay its whole indebtedness, arising under said act, in any bonds of the State of which it might become possessed, and was merely a provision for effectuating the just and lawful exchange of one debt for another, upon the basis of mutual rights of set-off.

8. This respondent further says that immediately after the proclamation of peace, in the spring of 1865, the General Assembly of the State of Tennessee, then in session, addressed itself to the subject of the condition of the railroads of the State and of the public debt. The Louisville and Nashville Railroad Company was, at that time, the

strongest corporation, financially, owning or operating any railroad in Tennessee, for the reasons, that the principal part of its lines were situated in the State of Kentucky, and had suffered less than Tennessee roads from injury inflicted by reason of military operations. Accordingly, the first step taken was to seek a settlement with that company for the liquidation and payment of its indebtedness to the State, on account of bonds issued to it to aid in the construction of its main stem from the State line to Nashville.

This respondent says that the discharge and satisfaction of the debt, due from the Louisville and Nashville Railroad Company to the State of Tennessee, and a lien reserved under said statutes for the security of the same, was effected in the manner following, to-wit: On May 5, 1865, the General Assembly of the State, by joint resolution, appointed the comptroller, secretary of state, attorney-general, and commissioner of public works a board to make a settlement with the Louisville and Nashville Railroad Company, and if a satisfactory settlement could not be obtained, the governor was authorized to have instituted such legal proceedings as might be necessary to protect the interests of the State. On the 18th of November, 1865, said commissioners reported to the legislature that they had effected a settlement; that the bonds loaned said company by the State amounted to $560,500, and the overdue interest thereon to $147,131.25; that the company had proposed to pay the entire principal in straight six per cent. coupon bonds of the State and the interest in coupon bonds of the State then due. The commissioners say: "Believing it to be manifestly for the interest of the State to call in this large installment of its indebtedness, and believing, moreover, that the company had a right under the law regulating the sinking fund to pay off its entire

indebtedness of the bonds of the State, your commissioners accepted the proposal, and executed to the company a receipt dated November 17, 1865, for $707,631,25 in bonds and coupons of the State, being the total indebtedness of said company to the State of Tennessee on account of the bonds of the State received in aid of the construction of said road and the bridge across the Cumberland river." Copies of said resolution and report are herewith filed as Exhibits Nos. 3 and 4 respectively. And this respondent says that the said railroad company actually paid and delivered said bonds and coupons as in said receipt is recited.

9. This respondent further says that the facts of this settlement were public and notorious, and were well known at the time to the public at large, to the holders of Tennessee State bonds, and, as this respondent avers and charges, to the complainant and those with whom he was associated and acting in the prosecution of this and similar suits; and that it was equally well known that it was made under a claim of right and in pursuance of an interpretation of the statutes of 1851, 1852, and of the subsequent legislation, which treated the lien upon the railroads reserved thereby as belonging to the State, not in trust for the holders of its bonds, but in its own right, to be dealt with in its own discretion and with sole regard to its own interests; and that consequently, although at the time this settlement was made in 1865, the State was in default for non-payment of the interest on its bonds from July, 1861, no protest or complaint was ever made by any holder of State bonds against this mode of dealing on its part with the said roads, nor against this settlement with the Louisville and Nashville Railroad Company, until the filing of this bill.

10. This respondent further says that the bonds and coupons paid by the Louisville and Nashville

Railroad Company to the State of Tennessee in the said settlement, were not the identical bonds and coupons originally advanced and loaned to said company and by it negotiated and sold, but that the same, in part at least, were other bonds and coupons of the State of Tennessee, of like character thereto; that by the terms of the seventh section of the act of February 11, 1852, the said company was required, at the end of five years after completion of its road, to set apart one per centum per annum upon the amount of bonds issued to it, and use the same in the purchase of any bonds of the State of Tennessee, paying said bonds so purchased into the treasury of the State after assigning them to the governor, taking his receipt therefor, and which bonds, it was thereby declared, so paid in, as between the State and said company should be a credit on the bonds issued to the company; and said bonds, so paid in, and the interest accruing thereon from time to time, should be held and used by the State as a sinking fund for the payment of the bonds issued to the company, but that should said company repurchase any of the bonds issued to it under the provisions of said act, they should be a credit as aforesaid and canceled; and thereby, as this respondent insists, there accrued to the company, in addition to the obligation to pay said one per cent. per annum, the right at its election, with the concurrence and consent of the State, to pay any additional amount of bonds of the State, of any description, into said sinking fund with like effect.

And this respondent further says, that by an act of the General Assembly of the State of Tennessee, passed March 20, 1860, entitled "an act to provide for the equalization and investment of the sinking fund in the bonds issued to or indorsed for railroads in this State," it was provided that the

money or bonds paid in to the sinking fund by the 1st day of January, 1860, with the interest thereon, should be passed directly to the credit of the parties having so paid the same, and be a release to said party for that amount of the debt due by them to the State of Tennessee, all bonds so paid in being canceled; and that after said date of January 1, 1860, the companies who had received State bonds, should be required to pay two and one-half per centum per annum on the amount of such bonds, as a sinking fund, which amount might, at the election of the companies, be paid in cash, or in the like character of bonds that might have been issued to them respectively; if paid in cash, the same to be invested immediately in bonds of the State, to be canceled, and to be of the same character as those issued to the said company making the payment; and it was further provided therein, that the sinking fund, when paid, in all cases, shall be passed directly to the credit of the said company or corporation, and be a release to said company or corporation from that amount due by them to the State, and that, thereafter, each railroad company should provide the interest semi-annually as therein provided by law, on the amount of bonds unpaid at the time said interest falls due, and not on the original amount issued to said company by the State, as theretofore provided: and thereby there was recognized in said companies the right to pay, in manner aforesaid, in any bonds of the State, the entire amount due from it to the State on account of bonds originally issued to it by the State; and it was in the exercise of this right, that the Louisville and Nashville Railroad Company made its payment as aforesaid, which was accepted by the State in satisfaction of the debt due from it to the State, on account of the bonds issued to it, and in discharge of the lien reserved by the State as its security therefor.

11. This respondent further says, that, at the time said settlement was made, the circumstances of the situation were such as to make it most advantageous to the State of Tennessee, and beneficial to its credit and its creditors. The war had but recently prior thereto definitely closed.

During the period of actual military operations, the railroads had been the prize of contending armies, as instruments of offense and defense. In the course of the struggle, they had been stripped of their equipment, and parts of them destroyed and repaired, as circumstances permitted, to fit them for military use, but so that when they were finally restored, on or about August, 1865, to their owners, they were destitute of rolling stock, cars, machinery, shops and tools, and almost every thing needed for an equipment, nearly everything of that description then in actual use upon the roads being the property of the United States, furnished and employed for its military uses. This they were permitted to purchase and did so in pursuance of executive orders issued by the President of the United States in September and October of that year, but being unable to pay cash, gave their obligations for the purchase money payable in installments and bearing interest. The roads themselves, their road beds, track, trestle-work, bridges, and permanent work of every description, were, to a greater or less extent, out of repair, in need of restoration, in some instances in a state of actual dilapidation. Business of every kind had been suspended by the war, except military transportation, and now, that employment ceased with the cessation of hostilities, but the fruits of peace, in the revival of industry and trade, could only come with the lapse of time, and the gradual accommodation of the community to the new order of things. The general result was that the railroads required large

sums of money to put them in a condition to earn an income, and, after that, would have to wait the slow operation of general causes upon the social condition of the people, before any revival of trade would renew their sources of revenue. In the meantime, a large arrearage of debt, for unpaid interest, had accumulated by reason of the default, during the whole period from July, 1861, both of the State and the railroad companies, in consequence of which the State securities had become discredited in the markets of the world, and their holders, as seen by the quotations in the stock markets at New York, were willing to dispose of them at a large discount. To buy them from those willing to sell, at their own offers, was no injustice to the bondholders; to pay them into the sinking fund, as a credit on the railroad debt, would be a relief to the companies, and would diminish the burden of the State, and reduce the amount of its obligations, so as probably to bring the State debt within the limits which would make it tolerable, and so diminish the motive and temptation to repudiate it, while the demand thus created for depreciated securities would naturally, as in fact it did, raise the prices in the market of those held by others who did not choose to sell; so that the transaction was well calculated, without injury or loss to any one, to prove beneficial to all the important public and private interests affected.

12. This respondent further says, that about the time said settlement was made with the Louisville and Nashville Railroad Company, on November 8, 1865, the General Assembly of the State of Tennessee, by joint resolution of that date, appointed a joint committee to examine into the condition of the sinking fund, and ascertain what railroads had paid, and what amount, and if they had due credit, and also that they be authorized to cancel all bonds

of the State that had been paid in by railroads; and this respondent says, that while he is ignorant of the exact amount of State bonds that, at that time, had been paid in on account of the sinking fund by the railroads, and for which they were entitled to credit on account of their indebtedness to the State for its bonds loaned to them under the general internal improvement acts, yet, that it amounted to a considerable sum, and that said bonds had been paid in, as by law the railroad companies had the right to do, whether they were the identical bonds loaned to the company paying them into the State treasury, or other State bonds, issued to other railroads, or for the general purposes of the State; and this respondent says, that no other mode of reducing the indebtedness of the State to its bondholders, or of the railroad companies to the State, was in fact practicable, for the reason that no difference was made in the stock market in Tennessee State bonds, as to price or description, on account of having been issued to one railroad company and not another, or between those issued to railroad companies under the internal improvement acts, and those issued by the State for other purposes; nor could any purchaser or seller of bonds have knowledge, without carefully tracing their numbers in the books of the secretary of State, on what account and to whom they were originally issued, so that no railroad company could practically go into the market and purchase exclusively State bonds which had been originally loaned to it, under the internal improvement acts, and it was a fact and practice well known to the complainants, as to all the holders of State bonds, that they were from time to time bought in the market for the purpose, and actually paid into the sinking fund, without discrimination, as stated hereinbefore, accepted by

the State as a payment on account of the debt due from the railroad company so paying them into the treasury, and credited to it in account, and treated, as between such company and the State, as paid and canceled bonds.

13. This respondent further says that, at or about the date of said settlement between the Louisville and Nashville Railroad Company and the State of Tennessee, to wit, on the 23d day of November, 1865, the General Assembly of said State passed an act entitled an act to amend an act entitled, "an act to establish a system of internal improvement in the State," passed the 11th of February, 1852, whereby the governor of the State was authorized and instructed to issue the six per cent. coupon bonds of the State, similar in character in every respect to the bonds issued under said act of 1852, and maturing at the same time, to an amount sufficient to pay off all the bonds and interest past due, as well as that to fall due January 1, 1866, or on any bonds that might fall due during the year 1867, issued or indorsed by the State prior to the 6th day of May, 1861, said bonds to be dated on the 1st day of January, 1866, and payable on the 1st day of January, 1892, to be sold and negotiated at not less than par or exchanged for the interest coupon bonds thereby provided to be paid, estimating each at their par value. And it was further provided in said act, that the State should have the liens upon each of the roads, their franchises, and property, for the prompt and faithful payment of the principal and interest of the bonds thereby authorized to be issued, to pay the interest on the bonds said company should have paid interest on as it had under the said act of February 11, 1852, for the bonds issued under that law; and the said several railroad companies receiving aid under this act should pay the interest on said bonds, as it ma-

tured, in the same manner and under the same rules, regulations and restrictions as they were then required to pay on the bonds issued or indorsed for them under the said act of February 11, 1852, commencing the payment of said interest on the 15th day of June, 1866, the amount of interest due on January 1, 1866, by any railroad company to the State on bonds issued to or indorsed for said company, being charged up to said company on the same terms and conditions of the original loan under the said act of February 11, 1852.

It was further provided by the said act of November 23, 1865, that the obligations on the part of the railroad companies to pay into the sinking fund two and one-half per cent. per annum on the amount of their indebtedness to the State, be suspended until January 1, 1867, and said companies relieved from the payment of sinking fund then past due, and that during the year 1867 each of said companies should be required to pay four per cent. on the amount of its indebtedness to the State, to be paid in any bonds of the State of a like character to those issued or indorsed for said company, with the coupons on the same that have not matured, semi-annually on the first of April and October, and a like amount every year thereafter until the whole of their indebtedness is discharged.

And this respondent says that every holder of bonds of the State of Tennessee, originally issued under the internal improvement laws, including the complainant, if at that time he was holder of any such, accepted the provisions of this act of November 23, 1865, surrendering to the State the overdue and unpaid coupons of said bonds, which had matured from July 1, 1861, to January 1, 1866, and receiving in exchange therefor the said State bonds, authorized thereby, and subject to all the

terms and conditions of said act, affecting either said new bonds or the original bonds held by them, and thereby admitted and consented to the expressed right reserved to the railroad companies to pay their indebtedness to the State, on account of said bonds originally loaned to them, in any bonds of the State of like character.

14. This respondent further says, that after the proceedings and legislation of the State of Tennessee, hereinbefore set out, including said settlement with the Louisville and Nashville Railroad Company of November 17, 1865, and the passage of said act of November 23, 1865, the market price of the bonds of the State of Tennessee, in the city of New York, rose from about fifty cents on the dollar in the month of March in that year to ninety-two cents on the dollar in the month of December in the same year.

15. This respondent further says, that at its same session, on the 18th day of January, 1866, the General Assembly of the State of Tennessee passed another act to amend the said act of February 11, 1852, wherein it is recited that the Memphis and Ohio Railroad, the Memphis, Clarksville and Louisville Railroad, the Edgefield and Kentucky Railroad, the Manchester and McMinnville Railroad, the Nashville and Northwestern Railroad, the Mississippi and Tennessee Railroad, the East Tennessee and Virginia Railroad, the Knoxville and Kentucky Railroad, the Winchester and Alabama Railroad, and the East Tennessee and Georgia Railroad were all out of repair, the bridges and trestles on said roads had been destroyed, and the companies were unable to put them in running order, and the State had a large interest in said roads, and it was to the interest of the State and the people of the State that the said roads should remain under their control, and that they should be put in running order.

It was therefore thereby enacted that the governor of the State be authorized and instructed to issue the bonds of the State, bearing six per cent. interest, with coupons attached, similar in every respect to the bonds issued under the act intended to be amended, viz., the act of February 11, 1852, and maturing as thereinafter provided, to the said named railroad companies, or receivers of such roads, appointed by the governor under the laws of the State, in the amounts therein named, amounting in the aggregate to the sum of $3,283,000, besides $125,000 to the Nashville and Chattanooga Railroad Company, for the completion of the branch road from Bridgeport, Alabama, to Jasper, Tennessee, and $75,000 to the Southern Central Railroad, for the purpose of assisting in paying for their bridge.

And it was further provided in said act, that each of the said railroad companies, to which relief was granted by said act, should pay to the treasurer of State, as a sinking fund, four per cent of the amount of its indebtedness under said act, as also the interest on said bonds; the sinking fund to commence on the first of January, 1867, as a fund for the payment of said bonds; and the State thereby reserved a lien on all the profits of said roads, for the money thereby advanced for the repairing of the same, which the State should have the right to enforce, if the said companies should fail to pay the four per cent, and interest, as provided by the said act, and which should be enforced as provided by law, in the internal improvement act of the State, and said lien, thus reserved, was thereby also declared to be cumulative of, and in addition to, the lien declared in the act of 1852, which said act it was intended to amend, which lien—that is, under said last mentioned act —was thereby declared to extend to, and cover, the

money or bonds to be advanced to said roads under said act.

16. This respondent further says, that in pursuance of the same policy, to extend and enlarge the aid of the State to its railroads, in order to restore and repair them, the General Assembly of the State passed additional acts, to which reference is here made, viz:

An act to incorporate the Tennessee and Pacific Railroad Company, and for other purposes, passed May 24, 1866.

An act to amend an act, passed January 18, 1866, entitled, "An act to establish a system of internal improvements," passed February 11, 1852.

Under which two acts, bonds of the State were directed to be loaned to the amount of three millions and ten thousand dollars ($3,010,000), to the railroad companies therein named, upon the same conditions prescribed in the internal improvement act of 1852 and its amendments.

And by an act, passed February 18, 1867, the act of November 23, 1865, above referred to, was amended so as to postpone the commencement of the payment by the railroad companies, of the four per cent sinking fund, from the year 1867 until the year 1870.

17. The respondent further says, that many of the railroad companies were unable to provide the means to meet the interest falling due on the 1st of July, 1867, which by law they were bound to provide, and failed to do so, to the extent of nearly $800,000, but that the State nevertheless paid the whole amount of interest falling due on that date on its bonds to the holders thereof; and thereafter, on the 7th day of December, 1867, the General Assembly passed an act entitled "an act to amend the internal improvement laws of the State, passed February 11, 1852," and thereby authorized the

loan in a like manner and under the same conditions imposed by the internal improvement laws of the State, to the several railroad companies therein named, of State bonds, to the aggregate amount of three million seven hundred thousand dollars ($3,700,000), besides an additional sum of $5,000 per mile to the Tennessee and Pacific Railroad Company; and by section 15 of said act it was "Provided, that if the several railroad companies or either of them to whom the bonds of the State has been loaned by this act or former acts, shall fail for two consecutive years, to pay the interest that may accrue upon the bonds loaned to them severally, then, and in that case, the governor, secretary of state, and comptroller may, at their discretion, sell said railroad track, railing, rolling stock, etc., upon such terms and conditions as they may deem best to secure the interest of the State, and shall retain of the proceeds of said sale, the amounts loaned to said companies and the interest due on the same, with expenses of said sale," and also, on the 26th of January, 1869, passed an act to amend the internal improvement act of 1852, by making it the duty of each railroad company, to whom had been issued the bonds of the State, at least fifteen days before the interest becomes due, from time to time, to pay the amount of such interest, including exchange and necessary commissions, to the Comptroller of the State, instead of the Bank of Tennessee, as originally provided in the acts of 1851–1852.

18. This respondent further says, that on February 24, 1870, the General Assembly of Tennessee passed an act to fund the floating debt of the State, and thereby made provision for funding the interest on the public debt of the State then due, and that which might become due on or before the first day of January, 1874, in new bonds of the State,

with coupons attached, redeemable by the State in not less than five nor more than twenty years, at the pleasure of the State, bearing interest at the rate of six per cent. payable semi-annually; and it was thereby also enacted that the amount of interest then due, or that might become due by the 1st day of January, 1872, to the State on bonds issued to railroad companies, might be paid by said railroad companies in the bonds of the State or past due coupons, as the said companies might elect, and the Comptroller of the State was authorized and instructed to receive said bonds or coupons in payment of the said interest due to the State by said railroad companies, provided, that no railroad company in the State should be entitled to the provisions of that section, unless they had paid or should pay, in cash, fifty per cent. of the amount due and owing to the State by such railroad companies on the first day of July, 1869.

And this respondent says that on March 17, 1873, the General Assembly of Tennessee passed an act entitled "an act to fund the past due bonds and coupons of the State, and to sustain the credit thereof," and thereby enacted that all the outstanding legally issued bonds of the State of Tennessee, due, or to become due before the first day of January, 1874, as well as all past due coupons, and coupons maturing on or before the first day of January, 1874, might be funded in six per cent. coupon bonds of the State of Tennessee, to be styled "the new series of funding bonds," redeemable, at the option of the State, after July 1, 1884, and due and payable on the first of July, 1914, and bearing six per cent. interest, evidenced by coupons attached, payable semi-annually, on the first days of January and July in each and every year, from and including the first day of July, 1874, to the maturity of the bonds; and it was thereby further

enacted, that the faith, honor, and credit of the State of Tennessee was thereby pledged for the payment of said bonds at maturity, and providing a sinking fund for that purpose, and for the prompt payment of interest on said bonds, as well as the interest on the registered bonds thereinafter provided for, commencing with the interest to fall due the first day of July, 1874; and it was thereby made the duty of the Treasurer of the State to set apart for that exclusive purpose so much of the revenues as might be necessary to pay the interest on said bonds, commencing with the interest that falls due the first day of July, 1874; and, by the ninth section of said act, it was further enacted, that no coupons of bonds then due should be paid, other than those coupons falling due on and after the first day of July, 1874, and only such coupons of said bonds maturing after that time as should be presented to the Comptroller, who was required to examine the same, and if found to have been issued according to law, should be registered, and the registration properly indicated thereon by him and the secretary of state. It was also provided by the fifth section thereof, that the said act should not affect the liabilities of any railroad, turnpike, or other corporation or person, for or on account of the bonds issued or loaned or indorsed by the State for internal improvements or other purposes, nor any lien in favor of the State as against purchasers of delinquent railroads.

And this respondent says that all the holders of the bonds of the State, including the complainant, if he then held any such, or, if not, his predecessors in the ownership of any he may now hold, and those associated and acting with him in the prosecution of this and similar suits, accepted the provisions of these acts, and funded their overdue coupons, and received payment of current accruing interest after

January 1, 1874, to January 1, 1876, in accordance with the terms thereof, and particularly that they registered their bonds, in compliance with the provisions of the ninth section of said act, and thereby assented to and adopted all the provisions of said act.

19. This respondent further says that in the meantime, on the 10th day of November, 1868, the governor of the State had informed the General Assembly that six railroads in the hands of receivers were at that time indebted to the State, on interest account due July 1, 1868, one million one hundred and twenty thousand nine hundred and ninety-six dollars and eighty-six cents, and stated that he would have seized two other roads for failure to pay the July interest of that year, and placed them in the hands of receivers, but that he had learned by experience that to do so would only entail increased burdens upon the State treasury, and expressed the opinion that the interest of these roads, as well as that of the State, required that they should be sold, and the proceeds thereof applied to the reduction of the State debt. In the same message, he said:

"Leading gentlemen, connected with important railroads largely indebted to the State, are asking for authority to issue second mortgage bonds, with a view of exchanging them for State bonds. Thus purchasing State bonds by the avails of these second mortgage bonds, the debt now due by the State would in like amount be transferred to these railroad companies, and so the State would be relieved of a burden of several million of dollars of debt now resting upon it. I regard this proposition with approval, and advise its adoption by the Assembly. The payment of large debts now due from the roads alluded to, and the sale of the roads already in the hands of receivers, would reduce the State liabilities at least one-third."

And this respondent says that at that session, in pursuance of the policy thus recommended, the General Assembly passed, on February 25, 1869, the act entitled "an act to liquidate the State debt contracted in aid of railroad companies in the State of Tennessee," and on the 20th day of January, 1870, the act entitled "an act for the payment of the State debt," and on the 1st day of July, 1870, the act entitled "an act authorizing the sale and transfer of the interest of the State in delinquent railroad companies," and on the 8th day of July, 1870, the act entitled "an act appointing commissioners under certain circumstances to lease delinquent railroads," and on the 21st day of December, 1870, the act entitled "an act to amend the act of 1870, ch. 79, for the sale of interest of the State in delinquent railroad companies, passed July 1, 1870," and on the 13th day of December, 1871, the act entitled "an act to further enable railroad companies to pay their debts to the State and complete the construction of their roads."

And this respondent says, that at the session of the General Assembly in 1871, the governor, in his message to that body, stated that under said act of February 25, 1869, as amended by the Act of January 20, 1870, chap. 44, over eight million of dollars in the bonds of the State had been retired and canceled; that other roads had purchased and were then purchasing bonds with which to cancel their liabilities to the State under the said acts; and in order to prevent further delay on the part of solvent roads that had not retired their indebtedness to the State under said act, recommended that the act be either repealed, to take effect at some future time not remote, or that its provisions be so amended as that the roads be required to pay all accrued interest as well as the sinking fund not theretofore paid in. In the same

document, the Governor also stated that but three of the delinquent railroads remained unsold, and added: "It will be a gratifying result when the State is entirely divorced from the railroad system. And, although the sales will not realize all that was desired, and leaves a large debt to be provided for, yet the internal improvement system of Tennessee has added millions to her wealth and diffused such energy and enterprise into every class of society, that no intelligent man can regret the policy which inaugurated the system, notwithstanding a large amount of appropriations made since the war have been improperly expended."

20. The respondent further says, that the several railroad companies to whom loans of internal improvement bonds had been made and the State of Tennessee dealt together under the said acts of February 25, 1869, and of January 20, 1870, according to the terms thereof, the various railroad companies who were able to do so, and who were on that account called solvent, purchasing in the open market, at the market price, bonds of the State of Tennessee, without discrimination as to their description, or on what account, or to whom issued, the only practicable mode in which they could make purchases of the public debt of the State, and paying them to the State in satisfaction of the indebtedness of such railroad companies to the State on account of its advances of its own bonds to them, and in discharge of the lien reserved therefor to the State under the Internal Improvement Law of 1852 and the amendments thereto; and in order to raise the means so to do, the said railroad companies issued their own bonds, secured by mortgages on their railroad property as a first lien thereon, in substitution for that of the State, and declared by law and the certificate of the State to be first mortgage bonds, and the same were sold in the markets of this country and of

Europe, on the faith thereof, to innocent purchasers for value, to the amount of many millions of dollars, now outstanding; and that those railroads known as delinquent railroads, the corporations owning which were not able thus to liquidate their indebtedness to the State, were sold by the authority of the State, by virtue of judicial decrees, duly rendered in proceedings instituted and prosecuted by the State under and according to the provisions of the Act of December 20, 1870, to which all parties in interest, including the holders of State Internal Improvement bonds, were parties and bound thereby; and the purchasers thereof paid for the same, as by said act and decree they were authorized to do, in any bonds of the State.

And the respondent says that by virtue of said dealings and transactions, and in consequence thereof, the result, in regard to the reduction of the public debt reached, was as follows: The total bonded debt of the State, about the first of January, 1870, was about forty millions of dollars. The payments on account thereof, for and on behalf of railroad companies to whom internal improvement bonds were loaned, made into the treasury of the State, in bonds and coupons overdue, amount to twenty-one million four hundred and eighty-five thousand dollars, leaving the unpaid public debt of the State amounting to about nineteen million five hundred and fourteen thousand dollars. The account between the State and the two descriptions of railroads is as follows:

First. Defaulting railroads sold:

Bonds issued	$14,628,000 00
Int. funded, 1866	1,122,306 00
Int. unpaid, July, 1870	3,331,163 12
U. S. claims assumed	511,560 00
Total	$19,593,029 12
Amount realized by sale	6,698,000 00
Loss to State	$12,895,029 12

Second. Roads which have settled their indebtedness:

Bonds issued	$12,742,000 00
Int. funded, January, 1866,	1,850,768 00
Sinking fund paid	493,306 00
Unaccounted for	1,255,700 00

For a more particular account thereof, reference is hereby made to the statements herewith filed and marked Exhibit No. 5.

21. And this respondent further says that during the whole period of these transactions, from and including the settlement between the State and the Louisville and Nashville Railroad Company, beginning in May, 1865, and during the whole progress of this legislation, and of the liquidation, arrangements, and settlements authorized and required by it, and of the dealing between the railroad companies and the State, and of the railroad companies in borrowing money on the security of mortgages on their property, on the faith that all prior liens on account of the loans by the State of internal improvement bonds had been thereby removed and discharged or transferred by operation of law, to bonds issued by the railroad companies

in substitution therefor, the holders of the bonds of the State of Tennessee, in general, had knowledge of all that was taking place; the facts themselves were public, historical, and notorious, and the holders of Tennessee State Bonds, at an early stage in this series of transactions, formed a voluntary organization, represented by a committee, for consultation and co-operation in matters of common interest, and kept themselves well advised of each step in the history of the business; and on or about May 1, 1870, said bondholders, through their committee, of which J. J. Donaldson, Esq., was chairman, obtained a legal opinion from Hon. Henry E. Davies and Noah Davis, eminent counsel of the city of New York, affirming that they were in equity, beneficial owners of a lien under the act of 1852, reserved nominally to the State, upon each railroad, for the specific payment of the identical bonds issued to that railroad company, by virtue of a contract, protected by the Constitution of the United States; which opinion was printed in pamphlet form and generally circulated among the holders of the Tennessee State bonds, but not otherwise. And this respondent says, that he is informed, and believes, and so avers, that the said or a similar organization of Tennessee State bond holders, has been kept up ever since, and that the present suit, and other similar suits, now pending are prosecuted in the name of the complainants, by a committee of such organization.

And this respondent says that at no time did the said holders of Tennessee State bonds, or any one of them, including the complainant or those associated and acting with him in the prosecution of this and similar suits, ever make any demand upon any railroad company for the payment of any interest on the said bonds, or receive from any railroad company payment of any

coupon, or notify or inform, either directly or indirectly, any railroad company that it was claimed that any such liability, right, or lien existed, or make any objection to any of the acts of the State of Tennessee, inconsistent therewith, or object to the passage thereof, or oppose any payment, settlement, and liquidation, by any railroad company, of its indebtedness to the State, or make public, in any way, their claim as now asserted in this bill of complaint.

On the contrary thereof, this respondent says that they not only acquiesced in all the foregoing acts and transactions, by their tacit approval and consent, but that they actively advised and urged in individual cases, including the present complainant, or some one or more of those with whom he is and has been acting, the consummation of these arrangements, as beneficial to the holders of State bonds, and by frequent and public communications, to and with the authorities of the State, treated and dealt with it as their only debtor, and gave it to be understood that they looked to no other, and had no other to whom to look.

And this respondent says that on the 16th day of January, 1878, there was held, in the city of New York, a meeting of holders of Tennessee State bonds, the call for which was signed by the complainant, and others with whom he was then acting, and with whom he is still associated, and who, jointly with him, are prosecuting this and similar suits—namely, Eugene Kelly, Peter Geddes, John T. Terry, and others—and at which they were present and participating, and at which the following preamble and resolutions were adopted, viz.:

"*Whereas*, On the 8th March, 1877, at a meeting between a committee of five members of the Tennessee legislature (of which Col. John H. Savage was chairman) and a committee of arbitration (of which

Mr. George S. Coe was chairman), to whom had been referred the question of a fair and equitable adjustment between the Southern States in default and their bondholders, the debt of the State of Tennessee was fully discussed, with a view of ascertaining and determining what a fair and equitable adjustment of it would be; and,

"*Whereas*, At the conclusion of the conference between the committee of the Tennessee legislature and the committee of arbiters, the committee of arbiters made an award that the debt of the State of Tennessee ought to be readjusted by the issue of new bonds, at the rate of sixty per cent. of the total amount of the debt and interest, the new bonds to bear interest at six per cent., payable semi-annually, and the coupons for interest to be made receivable for all taxes and dues to the State; and,

"*Whereas*, The session of the legislature expired by constitutional limitation a few days after the award of the arbiters was rendered, and there was no time to enact a law to give it effect; and,

"*Whereas*, It was very generally understood that an extra session of the legislature would be convened, to accept a proposition from the bondholders to compromise the State debt, on the terms of the award of the committee of arbitration, and to enact a law to fully carry it out, the holders of a very large amount of bonds of Tennessee did make and send to the governor propositions of compromise on the terms of said award, and the governor did thereafter convene the legislature in extra session, to consider said proposition; and,

"*Whereas*, During the sitting of the legislature, the intervention of other parties, proposing and advocating before it other and different terms of settlement than those considered by the committee of the legislature and the committee of arbitration, and awarded by the latter committee, and agreed to by

the bondholders, was prejudicial to the interests of the State of Tennessee, and to her creditors, in so far as it has delayed a settlement; and

"*Whereas*, The bondholders of Tennessee had neither an agent nor other person to represent them before the legislature, but confided in the legislature, and fully expected that the senators and resentatives of the people of Tennessee would ratify and affirm the award of the distinguished and disinterested gentlemen who had acted as a committee of arbitration, and accept the proposition of the bondholders made in accordance therewith, unhesitatingly; therefore,

"*Resolved*, That efforts made by any persons who purported to represent the bond holders of Tennessee were entirely unauthorized, and that the declaration alleged to have been made at Nashville, that a settlement could be effected with the bond holders upon a lower basis than that proposed by the committee of arbitrators, of which Mr. George S. Coe is chairman, has no foundation in fact, so far as it relates to the great body of bondholders.

"*Resolved*, That while we deplore the attitude assumed by the legislature, while assembled at Nashville, in December, toward the bondholders, we believe that it resulted from the influence of unwarrantable interference of other parties than real bondholders, or their representatives.

"*Resolved*, That we have an abiding belief that the people of the great State of Tennessee will not, by the rejection of honest claims which they are abundantly able to pay, suffer a stigma long to rest upon them, the effect of which will be to paralyze the prosperity of the State, subvert its best interests, and engender that demoralization which must ultimately result in losses to its citizens, even far greater than to its creditors.

"*Resolved*, That the people of Tennessee be

urged to adopt such legislation as will uphold the honor of the State, and evince proper regard for the high integrity which has hitherto characterized her citizens.

"*Resolved*, That a committee of five be appointed, consisting of Eugene Kelly, John T. Terry (of E. D. Morgan & Co.), J. G. K. Duer (of James G. King's Sons), Peter Geddes (of Geddes & Smith), and Dr. R. S. Moran—Eugene Kelly to be chairman—to take such action as, in their judgment, may be for the interest of the bondholders; but with the understanding that no settlement less favorable than the award of the committee of arbitration be accepted."

And this respondent says that on the 11th day of December, 1877, the complainant, C. Amory Stevens, had addressed, by telegraph, from New York, to the governor of Tennessee, a communication, which was laid before the General Assembly, then in session, as follows:

NEW YORK, Dec. 11, 1877.

"GOVERNOR JAS. D. PORTER:

"I am a large holder of Tennessee bonds, which have been held for years strictly for investment account. I was a signer of the former petition, sent you through the committee of arbitration; and while I would prefer to have that proposition accepted, yet, if it would require a revenue bill that is deemed by the legislature to be higher than the State can afford to pay without seriously retarding the prosperity of the people, I prefer to change the original offer, and hereby do change it. I propose to take fifty cents on the dollar. I think this dispatch represents the sentiments of most of the investment holders. They recognize the embarrassed condition of the State, growing out of the war, and are willing to meet the situation in

a spirit of liberality, and now ask the legislature, through your excellency, to reciprocate this feeling, and make a settlement without further delay.

"Please submit this to the legislature for its action.

"THE ESTATE OF CALVIN STEVENS,
"C. AMORY STEVENS, *Trustee.*"

And this respondent says that the public debt of the State of Tennessee, which was the subject of these communications and propositions, amounted at that time, as reported to the General Assembly by the Governor, in the same message which transmitted the proposition made through the committee of arbitration, to twenty-three millions two hundred and twelve thousand six hundred and six dollars, on the first day of January, 1878, and which consisted chiefly of bonds issued under the Internal Improvement Acts of 1851, 1852, and the amendments thereto, and those issued for past due interest, and known as funding bonds, constituted what remained of the outstanding bonds of the State, after the payment made by the railroad companies in satisfaction of their indebtedness to the State under the internal improvement acts, and the sale of the delinquent roads and the payment of the purchase-money thereof in the bonds of the State, as provided in the acts of 1869, 1870.

And this respondent says and insist that the construction of the internal improvements act, thus practically established by the subsequent legislation and dealing of the public authorities of the State, with the railroad companies and with its creditors, and universally acquiesced in, has thereby acquired the force of law, and ought not now to be questioned, much less disturbed, to the injury and loss of many innocent persons in this country and in Europe, who have invested large sums of money on the faith and

credit thereof; and this respondent says that the complainant and those with whom he is associated and acting in this behalf, have, by their acquiescence in this course of dealing, invited and encouraged others to repose confidence and trust in the same, and ought not now to be permitted, in equity, to question the validity of transactions to which they have thus consented, and that whatever rights they may originally have had, as holders of State bonds adverse thereto, have been lost, by their own laches, acquiescence, and neglect to urge them, when they ought, if they had intended to insist upon them, and the claim now made so to do is, consequently, stale and inequitable.

22. And this respondent denies all charges and allegations of fraud and bad faith, made or imputed in said bill to the Louisville and Nashville Railroad Company, to the Memphis and Ohio Railroad Company, and to the State of Tennessee.

23. This respondent further says, that he files this answer as one of the trustees named in said two deeds of trust or mortgage above set forth, in his own name, without joining his co-trustee, Junius B. Alexander, and his other co-trustee, John F. Vail, for the reason that as they are citizens of the State of New York, this respondent has been advised that he could not join them in this answer, on account of the nature and limits of the jurisdiction of this Court in this case, and he insists that by reason of the premises, the claim of the complainant in the bill of complaint is without equity, and that the said mortgages and deeds of trust, to this respondent and his said co-trustees, for the uses and purposes therein mentioned, and for the benefit and security of the holders of the bonds therein described and intended to be secured, are the only subsisting liens on the said railroad and property therein conveyed and mortgaged.

24. And this respondent, therefore, by reason of the premises, ask that this, his answer, may be taken as a cross-bill, and that the complainants and his co-defendant, The Louisville and Nashville Railroad Company, may be made defendants thereto, and compelled to make answer thereto, and that on final hearing this honorable Court will order, adjudge, and decree that said deeds of trust and mortgages, herein set forth, made to this respondent and to his said co-trustees, are in respect to the claim of the complainant, and of all other holders of the bonds of the State of Tennessee, originally loaned by said State to the Memphis and Ohio Railroad Company, the best and only liens and incumbrances, in their order, on said property therein described, and that in respect to the right and title of this respondent, as trustee under the same, and the equity of the holders of the bonds thereby intended to be secured, the lien originally reserved by the State of Tennessee, on account of its bonds loaned to the said The Memphis and Ohio Railroad Company, has been effectually discharged and released, and that this respondent, as trustee as aforesaid, be forever quieted in his said right and title under the same, against the claim of the complainant and all other holders of bonds of the State of Tennessee, and that they be perpetually enjoined from hereafter setting up their claim as aforesaid, and for such other and further relief as this respondent and complainant in said cross-bill may in equity and good conscience, and according to the usages and practices of courts of chancery, be entitled to.

MATTHEWS, RAMSEY & MATTHEWS,
Solicitors for Defendant John B. Smith.

STANLEY MATTHEWS,
Of Counsel.

State and County of New York:

Personally appeared before me,.....

.....

the undersigned John B. Smith, and made oath that the facts stated in the foregoing answer are true to the best of his knowledge, information, remembrance, and belief.

.....

Sworn to and subscribed before me, this.....

day of....., 1879.

.....

APPENDIX.

Exhibit No. 1.

MORTGAGE FROM THE MEMPHIS AND OHIO RAILROAD COMPANY TO JOHN B. SMITH, OF KENTUCKY, AND JUNIUS B. ALEXANDER, OF NEW YORK, TRUSTEES, DATED JUNE 1, 1871.

AN INDENTURE made the first day of June, one thousand eight hundred and seventy-one, between the Memphis and Ohio Railroad Company, a corporation duly created by and under the laws of the State of Tennessee, party of the first part, and John B. Smith, of Louisville, in the State of Kentucky, and Junius B. Alexander, of the city of New York, parties of the second part:

Whereas, It has become and is necessary for the said party of the first part to raise money to be used for the purpose of meeting and discharging debts duly contracted in the course of its legitimate business and owing by it, and to be used for other lawful purposes authorized to it by its charter, and by the laws of the State of Tennessee; and to such end said party of the first part has determined, in pursuance of the powers conferred upon it by the statutes of the State of Tennessee, to issue and sell the bonds of said company to the amount of three million five hundred thousand dollars, with the privilege to the holders of such bonds of receiving in payment of principal and interest thereon respectively an equivalent therefor in sterling money of Great Britain, as hereinafter specified, and thereupon and thereby to raise the money which is so necessary for it upon the means of the company by proper and suitable conveyance; that is to say, upon the credit and security of said bonds, and of this indenture of mortgage and the property thereby mortgaged, as is authorized by the laws of the State of Tennessee, and particularly by a certain act of the legislature of that State, passed December 16th, 1853.

And whereas, The said company has thereupon caused to be prepared and made ready for issue and sale for

the purposes aforesaid, its certain three thousand five hundred bonds, for one thousand dollars each, with the privilege of the holder of receiving for principal and interest respectively an equivalent in sterling money as aforesaid, the said bonds being numbered consecutively from number 1 (one) to number 3500 (thirty-five hundred), both inclusive, bearing date on the first day of June, eighteen hundred and seventy-one, and payable in gold coin of the United States on the first day of June, in the year nineteen hundred and one, which bonds bear interest from their date at the rate of seven per cent. per annum in like gold coin, payable semi-annually, on the first days of June and December in each year, in accordance with the coupons for such interest to said bonds annexed, and which coupons are numbered correspondingly to the bonds to which they are respectively attached, with likewise a consecutive numbering of the coupons in the order of maturity, and which bonds and coupons respectively are in the following form, that is to say :

UNITED STATES OF AMERICA, }
State of Tennessee. }

Seven per cent. First Mortgage Gold Loan Limited to $3,500,000.

$1,000. £200.

" The Memphis and Ohio Railroad Company hereby acknowledges itself to be indebted to John B. Smith and Junius B. Alexander, or bearer, in the sum of one thousand dollars, for money borrowed for purposes authorized by the charter of said company and the laws of the State of Tennessee, which will be due and said company will pay to the holder of this bond in gold coin of the United States at the Bank of America, in the city of New York, on the first day of June, nineteen hundred and one ; or, at the holder's option, said company will pay at such time two hundred pounds sterling in London instead of such payment of one thousand dollars, in New York, and said company further promises to pay interest upon said sum from the date hereof, at the rate of seven per cent. per annum in like gold coin, free of United States government tax, semi-annually, on the on the first days of June and December, at the Bank of America, in the city of New York, or, at the holder's option, seven pounds, five shillings and ten pence sterling, as the equivalent hereof, at the office of Baring Bros. & Co., in London, in accordance with the coupons for such interest hereunto annexed, upon presentation and surrender of such coupons,

"This bond is one of a series of three thousand five hundred bonds, of like amount, date, and tenor, numbered consecutively from one to three thousand five hundred inclusive, making $3,500,000 in the aggregate, issued and to be issued by said company for money borrowed as aforesaid, each of which bonds is equally secured by a first mortgage of even date herewith made by said company to John B. Smith, of Louisville, and Junius B. Alexander, of New York, as trustees, upon the railroad of said company, extending from Memphis to Paris in the State of Tennessee, a distance of about one hundred and thirty-one miles, with the rolling-stock thereof, and the appurtenances, and all the property, rights, franchises, and privileges of said company, according to the purport of said mortgage, duly authorized by the laws of the State of Tennessee, executed and delivered to the said trustees, and recorded in the several counties through which said railroad runs. This bond may, at the option of the holder, be registered at the office in Louisville, Kentucky, of the Louisville and Nashville Railroad Company, which is constituted agent of this company for keeping such registration, or by the transfer agent in the city of New York of said Louisville and Nashville Railroad Company; and after such registration made and noted by indorsement hereon, this bond, unless thereafter registered payable to bearer, will be payable only to such person as on such registry noted by indorsement hereon shall appear from time to time to be the last duly registered transferee or owner; but such registration shall not affect the negotiability of the coupons. This bond, in order to be entitled to the benefit of said mortgage security, must be certified by the trustees to be one of the bonds issued under such mortgage.

"In testimony whereof, this company hath hereunto affixed its corporate seal and caused these presents to be signed by its president and secretary, at Memphis, in the State of Tennessee, the first day of June, eighteen hundred and seventy-one.

"———, *Secretary*, ———, *President*."

[FORM OF COUPON.]

$35. £7 5s 10d.

The Memphis and Ohio Railroad Company will pay the bearer, free of United States government tax, thirty-five dollars ($35) in United States gold coin, at the Bank of America, in the city of New York, or, at his option, seven pounds five shillings and ten pence sterling (£7 5 10) at the office of Baring Bros. & Co., in London, on the first day of————, being six months' interest on bond.

Coupon No. ——— ———, *Secretary*.

And whereas, The said bonds are to be executed under the corporate seal of said company, with the signatures of its president or vice-president and secretary, and the said coupons to be attached to and issued with such bonds are to be either signed by the secretary of said company, or authenticated by the engraving of his proper signature thereto, which latter shall be sufficient to bind the said company upon the coupons thus issued by it.

And whereas, The said bonds are to have indorsed upon the same respectively the certificate of the said parties of the second part hereto, or their successors in the said trust, authenticating the same as being issued under and secured by this mortgage, and are not to be entitled to the benefit of the security afforded by this mortgage unless authenticated by such certficate signed by the trustees, which certificate is to be substantially in the form of the following, that is to say:

"We certify that this is one of the 3,500 bonds for $1,000 each, issued under and entitled to the security of the mortgage dated June 1, 1871, from the Memphis and Ohio Railroad Company to John B. Smith and Junius B. Alexander, as trustees.

} *Trustees.*"

And whereas, In order to raise the amount of money which is required by the necessities of said company for the purposes aforesaid, it is necessary for said company to issue and sell its bonds as aforesaid, to the said amount of three millions five hundred thousand dollars.

And whereas, The board of directors of the said The Memphis and Ohio Railroad Company, at a meeting thereof duly held on the seventeenth day of May last, duly resolved to issue and sell, in order to raise money for the purposes aforesaid, the above-mentioned three thousand five hundred bonds for one thousand dollars each, with such coupons attached thereto, with the privilege to the holder of receiving for principal or interest respectively an equivalent in sterling money as aforesaid, and to secure the payment thereof by this indenture of mortgage, to be executed by said company under its corporate seal, with the signatures of its president and secretary.

Now this Indenture Witnesseth, That, in order to secure the due and punctual payment of the above-mentioned three thousand five hundred bonds for one thousand dollars each, and of the said coupons for the interest thereon, or, at the holder's option, such equivalent in sterling as aforesaid, according to the tenor and effect of such bonds and coupons

respectively, to the persons or corporations who at the time being shall be the owners and holders, or lawfully entitled to demand and receive payment of the same respectively, equally in respect of all the said bonds, without preference or priority of one over another, by reason of priority in the time of issue or negotiation thereof, or otherwise, and in consideration of the premises and of one dollar by the said parties of the second part to the party of the first part paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said The Memphis and Ohio Railroad Company, party of the first part, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said parties of the second part, as trustees, as hereinafter mentioned, and their heirs and assigns forever, and to their successors in said trust and assigns.

All and singular the railroad of the said party of the first part, extending from a point in Memphis, in the State of Tennessee, to and into Paris in the same State, a distance of about one hundred and thirty-one miles, with all the track or roadway thereof, and the rails thereon laid and other structures thereon, and all the lands, rights, easements, and privileges, whether in fee or leasehold, or otherwise acquired or to be acquired by the said party of the first part for the purposes of or in connection with the said railroad, and all the depot grounds and sites used or intended to be used for stations, car-houses, engine-houses, machine-shops, offices or other buildings of or appertaining to said railroad, with all the buildings, structures, and improvements whatsoever erected or placed or to be erected or placed upon any or all such grounds or sites and all bridges, fences, wharves, piers, buildings and other improvements whatsoever belonging or appertaining to, or used, or intended to be used, for the purposes of or in connection with the said line of railroad, and also all the locomotives and tenders, passenger-cars, freight-cars, baggage-cars, and other cars, and other equipments and rolling-stock whatsoever, and all the tools, machinery and implements belonging to or used or intended to be used for the purposes of or in connection with said railroad or any part of the same, or for the working or operation thereof, or for the reparation of such railroad or its appurtenances or rolling-stock or equipment, and likewise all property and effects of any of the descriptions aforesaid which shall be hereafter acquired by the said company for the use of or in connection with the said railroad, or for any of the uses or purposes aforesaid, and likewise all other real and leasehold estates and properties. rights, easements, and

privileges whatsoever, situate or located in the State of Tennessee, now belonging to the said party of the first part, or which shall be hereafter acquired by it or its successors for the uses or purposes of or in connection with the said railroad or any part thereof, and likewise all goods and chattels whatsoever now belonging to the said party of the first part, and all goods and chattels which it or its successor shall hereafter acquire for the uses or purposes of or in connection with the said railroad or any part thereof, and also all the appurtenances whatsoever belonging or appertaining to the said railroad or to any of the property hereby mortgaged, and all the rights, privileges and franchises whatsoever which the said party of the first part is possessed of or entitled unto, or which the said party of the first part or its successors shall at any time hereafter acquire or become possessed of or entitled unto for or in connection with the use, enjoyment, maintenance or operation of the said railroad or any part thereof, and also all fuel intended for the use of or upon said railroad which may be on hand at the time of any default in the due and punctual payment of any of the principal or interest hereby secured or intended so to be, and the income, tolls, freights, and profits of said railroad from and after any such default.

To have and to hold all and singular the said premises, properties, and things, and rights and privileges and franchises, with the appuetenances, unto the said parties of the second part as trustees, as aforesaid, and their heirs and assigns forever, and to their successors in said trust, but as trustees, nevertheless, for the use of the several persons who shall be or become the owners and holders of or lawfully entitled to demand and receive payment of the said thirty-five hundred bonds and the said coupons attached thereto equally *pro rata*, and without preference or priority of one over another, and upon and for the trusts, uses, and purposes, and upon and subsect to the conditions and provisions hereinafter expressed and declared, that is to say :

First. So long as the said party of the first part, its successors or assigns, shall not make default in the payment of either interest or principal on any of the aforesaid bonds or coupons, as the same shall respectively become due and payable, and shall faithfully perform the conditions of said bonds, and the stipulations and conditions of this indenture, said party of the first part, its successors and assigns, shall be entitled to retain the possession of the railroad and other property, rights, and franchises hereby conveyed, and use, enjoy, and operate the same, and to receive and enjoy the income thereof as authorized by law.

Second. And said party of the first part does covenant and

agree for itself, its successors and assigns, to and with said parties of the second part, their successor and survivors, as follows: That said party of the first part will pay all taxes, charges, rates, levies, and assessments imposed, assessed, or levied, or, which may hereafter be imposed, assessed or levied, upon all or any part of the property or franchises hereby conveyed or attempted to be conveyed, and will take care of and preserve the same, and at its own cost will do all acts necessary to be done to keep valid the lien hereby created upon all the property and franchises hereby conveyed or intended to be conveyed or covered, and that said party of the first part and its successors will at any time, and from time to time, upon request, execute, acknowledge, and deliver under its corporate seal in due form, to said parties of the second part, their survivor or survivors, successor or successors, all such other assurances, deeds, mortgages, or other instruments of writing, and will do all such other acts and things as may be reasonably requested for the better carrying into effect of the true intent and meaning of these presents, and for effectuating, completing, and confirming the lien and operation of this mortgage as an effectual security for all the said bonds for three million five hundred thousand dollars, or such equivalent in sterling as aforesaid, and the coupons accompanying the same, upon all and singular the properties, estates, rights, interests, and franchises hereinbefore mortgaged or purporting or intended so to be, including as well such of the same as the said comrany shall hereafter acquire or become possessed of or entitled unto as what is now owned or possessed by said company.

Third. In case of a local change in the line or erections of any part said road, the parties hereto may join in releasing the said land, or erections and premises, that may be abandoned, and not longer required for the due maintenance and operation of said railroad, or for the purposes of the party of the first part; provided, that before, or at the same time, additional land or erections acquired or made, of at least equal value, shall, by the party of the first part, be duly conveyed and fully assured to the party of the second part, in aid of the security intended by this mortgage.

Fourth. And the party of the first part further covenants with the parties of the second part, their survivors and successors, to pay to them, in the city of New York, on the first day of June in each year, beginning with the first day of June, eighteen hundred and seventy-three, a sum of money which shall be equal to one-half of one per cent. of the amount of bonds issued, and at the time of such payment outstanding under this mortgage, which said sums to be paid shall be a sinking fund to be used by the trustees to

purchase any of said three million five hundred thousand dollars of bonds so issued, at the rates at which they can be cheapest purchased in the public stock market of the city of New York; but no bonds shall be purchased at a rate at or above par. Whenever, on the arrival of said day for payment into said sinking fund, said parties of the second part shall, by reason of having been unable to purchase bonds below par, have unexpended an amount of such fund equal to one required annual payment into such fund, no payment need be made for such year; and if, for such reason, there shall be, unexpended, in such fund, a sum less than such required annual payment, no more need be paid for that year than shall be required to raise said fund to an amount equal to a full required payment that year. The trustees shall give receipts for all money paid into said fund, shall keep all the money thereof, not so used, invested in some trust company in the city of New York, at the best obtainable rate of interest, for the benefit of a fund, pending its use and shall cancel, and deliver to the party of the first part, all bonds therewith purchased, and no new bonds shall be issued in place of any so purchased.

Fifth. And it is further agreed, That in the event of the said party of the first part failing, for the space of ninety days, to pay the coupons for the semi-annual interest on any of the said bonds, as the same may become due, after the presentation and demand thereof, then, and in that case, the whole principal sum mentioned in each and all of said bonds shall forthwith become due and payable; and the lien hereby created for the security and payment thereof may at once be enforced, and thereupon, or on failure to pay any such aforesaid bonds as they shall become due, or to pay such sums as shall become due and payable to the sinking fund, said parties of the second part, their survivor, successor, or successors, shall, on request in writing of the holders of a majority of the bonds hereby secured, as a court may order or authorize, take possession of the road, franchises, and other property hereby conveyed by themselves or their agents, or by a receiver to be appointed, and may use and operate the same and receive the earnings and the income therefrom, and may institute and maintain foreclosure proceedings in any court having jurisdiction, and have whatever is herein mortgaged, sold, and conveyed by the direction of the court; and, out of the proceeds from said sale, or from the income and earnings of said property, rights, and franchises (after deducting the expenses incurred in and about said proceedings, the execution of this trust, the preservation and operation of said property, and reasonable compensation to said trustees, their agents and attorneys,

the payment of all taxes, levies, and assessments upon said property, and upon the income therefrom, all damages to which said parties of the second part, or their successors, may become liable by reason of the management of said property, and any other proper charge or expense not caused by the wilful personal misconduct of said parties of the second part, their survivors, successor, or successors), shall pay said bonds hereby secured, or so many of them as shall then be outstanding, together with all interest then due thereon, paying over the surplus, if any, to said party of the first part, its successors or assigns, or in case the same be not sufficient to pay all said bonds and interest, then shall distribute the same with *pro rata* equality among the holders of all such bonds and coupons, *Provided*, That if said company shall, at any time before a sale, and before said bonds become due by the terms thereof, pay all semi-annual interest then matured on any aforesaid bonds, and all said expenses, compensation, taxes, and damages, that then the principal and unmatured interest on such bonds shall be deemed not due by reason of any previous failure to pay interest, and no sale of the property for said previous failure shall be made. *And provided further*, That no sale of the property shall be made for a mere failure to pay into the sinking fund as herein required.

Sixth. It is further agreed, That upon the payment, at any time, in full of the said bonds, and the interest thereon, and the compensation and expenses of said trustees, this deed shall become void, and the estate and title hereby granted shall revert to and vest in said party of the first part, its successors and assigns, without other conveyance thereof, and it shall be vested with and deemed in possession thereof without any entry or other act therefor; and said party of the first part further agrees that it will, indemnify and save harmless the said parties of the second part, their survivor, successor, or successors, against all loss and damage to which they or either of them may be subjected by the execution of this trust, or by the operation and management of the property hereby conveyed, not caused by the personal misconduct or neglect of such parties of the second part, their survivor or successors.

And it is further agreed, That in the event of the declension, resignation, death, incapacity, or other disability of any trustee of the second part, or their successor or successors, the remaining or surviving trustee or trustees, or successor or successors, may, with the consent in writing of the then president of said company of the first part, or of any corporation which, as its successor, shall be owner of the railroad hereby mortgaged, appoint, by an instru-

ment in writing, under the hand and seal of such surviving or remaining trustee or successor (which shall be acknowledged and recorded in the office of land records in the several counties through which the railroad hereby mortgaged runs, or in which this deed is, by law, to be recorded, some competent person to fill such vacancy, and the person so appointed shall possess the powers and incur the obligations of an original party of the second part, hereto, and until such appointment, notwithstanding such vacancy, such surviving or remaining trustee or trustees, or successor shall have full power to execute all the trusts hereby created, and his or their acts shall be as valid as if done by all the parties of the second part hereto; and in case of such appointment said party of the first part covenants to make, upon request, all such deeds and other instruments as shall be necessary or appropriate to enable said party so appointed to execute the trust hereby created, as fully and completely as if such appointed party had been originally one of the parties of the second part.

And this Indenture further Witnesseth, That the parties of the second part do hereby accept the aforesaid trusts, and agree to execute them upon the following terms and conditions, which are mutually agreed to by the parties, viz: That neither trustee shall be answerable for the acts, omissions, or defaults of the other, to which he does not give his assent; that each shall be answerable for gross negligence and willful defaults only; that the trustees, or either of them, may employ or advise with legal counsel, and that the proper expenses thereof, and all the personal expenses of the trustees about the discharge of the trust, and all other reasonable and proper charges and expenses of the trustees, including their compensation, shall be paid by the party of the first part as they are incurred, or otherwise, out of the trust estate on which they are hereby charged; that neither trustee shall be bound to pay or discharge any prior charges or incumbrances on said mortgaged property or estate, nor any part thereof, without being first furnished with the money necessary to make such payments, by the persons so requiring, or otherwise that they shall not be required to act in the execution of these trusts, except at their own option, unless requested in writing by the holders of a majority of the outstanding bonds hereunder, nor unless furnished with such bonds as their counsel shall reasonably advise them are necessary and proper to enable them to commence proceedings, and also with a responsible indemnity or sufficient agreement to pay the current accruing expenses, obligations, and liabilities which they may incur by reason of so acting and their proper compensation in so doing; that they may

employ agents or attorneys in fact to act for them whenever required to act themselves, and shall not be personally resible for the neglect or default of any such agent or attorney in fact appointed in good faith, and that all the covenants and agreements herein contained or implied may be specifically enforced by any court of competent jurisdiction.

In Witness Whereof, The party of the first part has caused its corporate seal to be hereunto affixed, and this instrument to be subscribed by its president and secretary, and the said trustees subscribe the same to signify their acceptance of said trust, this first day of June, one thousand eight hundred and seventy-one.

Exhibit No. 2.

MORTGAGE FROM THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY TO HENRY F. VAIL, NEW YORK, AND JOHN B. SMITH, KENTUCKY, TRUSTEES. DATED NOVEMBER 1, 1873.

THIS INDENTURE OF MORTGAGE, Made on the first day of November, eighteen hundred and seventy-three, by and between the Louisville and Nashville Railroad Company, a corporation created, organized, and existing by and under the laws of the State of Kentucky, and likewise existing and possessing chartered rights and privileges by and under the laws of the State of Tennessee, party of the first part, and Henry F. Vail, of the city of New York, and John B. Smith, of the city of Louisville, Kentucky, trustees, parties of the second part, witnesseth as follows:

1. *Whereas*, The party of the first part needs and desires to raise money, to be used for the purposes authorized to it by the laws of the States of Kentucky and Tennessee, and to that end the president and directors of said company, at a meeting duly held on the 2d day of October, A. D. 1873, adopted the following resolutions:

"*Resolved*, That the president of this board have prepared and executed the coupon bonds of the company, not to exceed in amount four millions of dollars; three thousand of the bonds to be for one thousand dollars each, and two thousand of them to be for five hundred dollars each, and numbered from 1 to 5,000, to bear date the 1st day of November, 1873, and payable on the 1st day of November, 1883, in gold coin of the United States; to be signed by the president and countersigned by the secretary, with the seal of the company affixed; to bear interest at the rate of seven per cent. in like gold coin, payable semi-annually on the 1st day of May and November in each year, upon the presentation and delivery of the proper coupons at the Agency of the company in the city of New York; and that he execute in the name and on behalf of the company, to be countersigned and sealed as aforesaid, a mortgage of even date with said bonds on the property, rights, and franchises of the company in the States of Kentucky and Tennessee, subject to the existing mortgage of the company and the Memphis and Ohio Railroad Company on the same, to secure the payment of the principal and interest of said bonds, containing such terms and stipulations as may be deemed best to secure the same, as provided by the laws of Kentucky and Tennessee.

"The coupons to be attached to said bonds may be either signed by the secretary or authenticated by the engraving of his proper signature thereto, which latter shall be sufficient to bind the company, and the said bonds are to be numbered from 1 to 5,000 inclusive.

2. *And whereas*, In pursuance of said resolution and authority of its directors and stockholders, and of the powers conferred upon it by law, the party of the first part has executed under its corporate seal and signed by its president and secretary, and made ready for sale, and is about to issue and negotiate five thousand of its coupon bonds, numbered as aforesaid, three thousand of which are for one thousand dollars each, and two thousand for five hundred dollars each.

Each of said bonds bearing even date herewith (and having thereto respectively attached coupons for interest, consecutively and correspondingly numbered and dated, and authenticated by the engraving of the proper signature thereto of the secretary of said company as to each set of coupons), which bonds and coupons are in the form following, to wit:

[FORM OF BOND.]

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY SEVEN PER CENT. LOAN.

$1,000. *Principal and Interest in Gold.* $1,000.

No. ———.

The Louisville and Nashville Railroad Company hereby acknowledges itself indebted to Henry F. Vail, of the city of New York, and John B. Smith, of Louisville, Kentucky, in the sum of one thousand dollars of the gold coin of the United States for money borrowed, which sum it hereby promises to pay to them or the bearer hereof in such gold coin on the first day of November, in the year eighteen hundred and eighty-three, at the agency of the said company in the city of New York, and also to pay at the same place interest upon such principal sum in the meantime semi-annually, on the first day of May and November in each year until maturity, at the rate of seven per cent. per annum in like gold coin, according to the coupons for such interest attached hereto, upon the due presentation and surrender of such coupons. This bond is one of a series of five thousand bonds of like tenor and date, numbered consecutively from No. 1 to No. 5,000, inclusive, and amounting in the aggregate to $4,000,000—3,000 of such bonds being for $1,000 each, and 2,000 of the same for $500 each, issued or to be issued by the same company for money borrowed or to be borrowed thereon, and all of which are equally secured

by a mortgage of even date herewith upon all the railroads belonging to the said company in the States of Kentucky and Tennessee, with the rolling stock and appurtenances thereof, and the rights and franchises belonging thereto, duly executed by the said company to the said Henry F. Vail and John B. Smith, as trustees, and duly recorded in the respective counties of those States through which the railroads belonging to the said company run, and which is subject only to the existing mortgages for $8,000,000, £700,000 sterling, and £500,000 sterling, which respectively cover different portions of the railroads and property of the said company.

This bond shall not be valid until the certificate hereon indorsed shall be signed by said trustees.

In witness whereof, said company has caused this bond to be signed by its president and secretary, and its [SEAL.] corporate seal to be hereto affixed, at its office in the city of Louisville, this 1st day of November, 1873.

———, *Secretary.* ———*President.*

This bond may be registered at the office of the company, or at its agency in the city of New York, at the option of its holder; and thereafter, unless at any time registered payable to bearer, will be payable only to such person as on this bond shall appear from time to time to be the last duly registered transferee or owner thereof.

And the said bonds for five hundred dollars each are the same as the foregoing, except as to the amount.

[FORM OF COUPON.]

The Louisville and Nashville Railroad Company hereby promises to pay to the bearer hereof, at its agency in the city of New York, the sum of thirty-five dollars in gold coin of the United States on the 1st day of ——, 18—, for six months' interest due on that day upon its bond, No. ——, dated November 1, 1873.

No. ———. ———, *Secretary.*

And the form of the coupons on the bonds for five hundred dollars is the same as the foregoing, except as to the amount.

And whereas, The form of trustees' certificate to be indorsed on the said bonds and signed by the said trustees is to be in substance as follows, viz.:

We certify that this is one of the within-named five thousand bonds, dated November 1, 1873, issued under and entitled to the security of the mortgage of even date herewith, from the Louisville and Nashville Railroad Company to Henry F. Vail and John B. Smith as trustees.

———,

———,

Trustees.

Now this indenture witnesseth, That in order to secure the due and punctual payment of the before-mentioned five thousand bonds and the said coupons for interest thereon, according to the tenor and effect of such bonds and coupons respectively, to the persons or corporations who at the time being shall be the owners and holders or lawfully entitled to demand and receive payment of the same respectively, equally in respect of all the said bonds without preference or priority of one over another by reason of priority in the time of issue or negotiation thereof, or otherwise, and in consideration of the premises and of one dollar paid by the parties of the second part to the party of the first part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Louisville and Nashville Railroad Company, party of the first part, has granted, conveyed, and mortgaged, and does hereby grant, convey, and mortgage, and does transfer and set over unto the said parties of the second part, and their successor or successors, as trustees, for the common and equal benefit of all those who may be the holders of such bonds: (1) The main line of the railroad of the party of the first part between the city of Louisville, in the State of Kentucky, and the city of Nashville, in the State of Tennessee, and in said cities respectively, the same being about one hundred and eighty-five miles long; (2) The Bardstown branch of said railroad, extending from said main line to and within the town of Bardstown, in the State of Kentucky, the same being about seventeen miles long; (3) The Lebanon or Knoxville branch of said railroad, extending (as now completed) from said main line to and in the town of Livingston, in the State of Kentucky, a distance of about one hundred and ten miles, and also said branch as the same shall be extended or completed, until it shall reach the Tennessee State line, being in entire length about one hundred and seventy-two miles; (4) The Richmond branch of said main line (and being also a branch of said Lebanon or Knoxville Branch), extending from and in the town of Stanford to and into the town of Richmond, in the State of Kentucky, a distance of about thirty-three miles; (5) The Memphis branch of said railroad, extending from said main line to and into the city of Memphis, in the State of Tennessee, which includes all that part of said first party's railroad, from its main line to and into the city of Memphis, in the State of Tennessee, the line dividing the States of Kentucky and Tennessee, in the direction of the city of Memphis, a distance of about forty-seven miles, and that part of said first party's railroad extending from said dividing line between the States of

Kentucky and Tennessee to and into the town of Paris, in the State of Tennessee, a distance of about eighty-three miles, the same being formerly known as the Memphis, Clarksville and Louisville Railroad, and also that part of said first party's railroad extending from and into said town of Paris to and into the city of Memphis, in the State of Tennessee, a distance of about one hundred and thirty-one miles, and formerly known as the Memphis and Ohio Railroad; with all the roadway and tracks of said railroads and branches before mentioned and described and mortgaged, and the rails thereon laid or to be laid, and other structures thereon; and all the lands, rights, easements, privileges, and franchises, whether in fee or leasehold, or otherwise acquired or to be acquired by the said party of the first part for the purposes of or in connection with the said railroads and branches respectively before mentioned and described and hereby mortgaged; and all the depot grounds, and the sites used or intended to be used for stations, depots, car-houses, engine-houses, machine-shops, offices, or other buildings or structures of or appertaining to said railroads and branches before mentioned and described respectively and hereby mortgaged; with all the buildings, structures, and improvements whatsoever erected and placed or to be erected or placed, upon any or all of such grounds or sites; and all bridges, fences, wharves, piers, buildings, and other improvements whatsoever belonging to or appertaining to, or used or intended to be used for the purposes of or in connection with, the said lines of railroad and branches respectively before mentioned and described and hereby mortgaged; and also all locomotives and tenders, passenger-cars, freight-cars, baggage-cars, and other cars, and other equipments and rolling-stock whatsoever, and tools, machinery, and implements belonging or appertaining to, or used or intended to be used for the purposes of said railroads and branches respectively before mentioned and described and hereby mortgaged, or any part of the same, or for the working or operation thereof, or for the reparation of such railroads or branches, or their appurtenances or rolling-stock or equipment; and likewise all such property and effects as shall be hereafter acquired by the said company for the use of said railroads and branches before mentioned and described, and hereby mortgaged, or for any of the uses or purposes aforesaid; and likewise all other the real and leasehold estates and properties, rights, easements, and privileges whatsoever situate or located in the respective States of Tennessee and Kentucky now belonging to the said party of the first part, or which shall be hereafter acquired by it for the uses and purposes of said

railroads and branches respectively before mentioned and described and hereby mortgaged, or any part thereof; and also all the appurtenances whatsoever belonging or appertaining to the said railroads and branches respectively hereby mortgaged; and all the rights, privileges, and franchises whatsoever which the said party of the first part is possessed of or entitled unto, or which the said party of the first part shall at any time hereafter acquire or become possessed of or entitled unto, for or in connection with the use, enjoyment, maintenance, or operation of said railroads and branches respectively before mentioned and described and hereby mortgaged, or any part thereof, and also all raw material of all kinds and fuel intended for the use of or upon said railroads and branches respectively before mentioned and described and hereby mortgaged, which may be on hand now or at the time of any default in the due and punctual payment of any of the principal or interest hereby secured or intended so to be; and the income, tolls, freights, rents, and profits of said railroads and branches and other property hereinbefore mentioned and described and hereby mortgaged, from and after any such default. But the lien created to secure the payment of said bonds and coupons by this indenture of mortgage is subordinate to the liens created by a consolidated mortgage on so much of said company's property, income, rights, and franchises as are within the State of Kentucky, and so much thereof within the State of Tennessee as extends from the line dividing the States of Kentucky and Tennessee where the same is crossed by the said company's main line of railroad to and into the city of Nashville. Made and executed by the said party of the first part on the 1st day of April, 1868, to James Punnett and Junius B. Alexander, as trustees, to secure the payment of eight thousand bonds of one thousand dollars each, with coupons attached, and numbered consecutively from one to eight thousand, inclusive, and duly recorded in the proper offices in the cities of Louisville, Kentucky, and Nashville, Tennessee, and in the counties through which the main line and branches of said company's railroad pass. And also the lien created by an indenture of mortgage on so much of said company's railroad line and appurtenances, rights, franchises, income, etc., in the State of Tennessee, extending from the city of Memphis to the town of Paris in said State, and formerly known as the Memphis and Ohio Railroad; made and executed by the Memphis and Ohio Railroad Company, on the first day of June, 1871, to John B. Smith and Junius B. Alexander, as trustees, to secure the payment of thirty five hundred bonds for one thousand dollars or two hundred pounds sterling each, with coupons at-

tached, and numbered consecutively from one to thirty-five hundred, inclusive, and duly recorded in the proper offices in the counties in which said railroad lies ; and also to the lien created by an indenture of mortgage on so much of said company's railroad line and appurtenances, rights, franchises, income, etc., in the State of Tennessee, as extends from the town of Paris to the line which divides the States of Kentucky and Tennessee at the point where the same is crossed by the Memphis branch of said company's railroad line, the same being formerly the Memphis, Clarksville and Louisville Railroad, made and executed by the party of the first part on the 15th day of July, 1872, to John B. Smith and Junius B. Alexander, as trustees, to secure the payment of twenty-five hundred bonds, each for two hundred pounds sterling money of Great Britain, and numbered consecutively from one to twenty-five hundred, inclusive, and duly recorded in the proper offices in the city of Louisville and in the counties in which said railroad lies.

To have and to hold all and singular the said premises, properties, and things, and rights and privileges and franchises, with the appurtenances, unto the said parties of the second part, as trustees as aforesaid, and their heirs and assigns forever, and to their successors in said trust, but as trustees ; nevertheless, for the use, benefit, and security of the several persons who shall be or become the owners and holders of or lawfully entitled to demand and receive payment of the said five thousand bonds and the said coupons attached thereto, equally *pro rata*, and without preference or priority of one over another; and upon and for the trusts and uses and purposes, and upon and subject to the conditions and provisions hereinafter expressed and declared, that is to say :

First. So long as the said party of the first part, its successors or assigns, shall not make default in payment of either interest or principal on any of the aforesaid bonds or coupons, as the same shall respectively become due and payable, and shall faithfully perform the conditions of said bonds, and the stipulations and conditions of this indenture, said party of the first part, its successors and assigns, shall be entitled to retain the possession of the railroad and other property, rights, and franchises hereby conveyed, and use, enjoy, and operate the same, and to receive and enjoy the income thereby, as authorized by law.

Second. And said party of the first part does covenant and agree for itself, its successors and assigns, to and with said parties of the second part, their successors and successor and survivors, as follows : That said party of the first part will pay all taxes, charges, rates, levies, and assessments

imposed, assessed, or levied, or which may hereafter be imposed, assessed, or levied upon all or any part of the property or franchises hereby conveyed or attempted to be conveyed, and will take care of and preserve the same, and at its own costs will do all acts necessary to be done to keep valid the lien hereby created upon all the property and franchises hereby conveyed or intended to be conveyed and covered; and that said party of the first part and its successors will, at any time, and from time to time, upon request, execute, acknowledge, and deliver, under its corporate seal in due form, to said parties of the second part, their survivor or survivors, successor or successors, all such other assurances, deeds, mortgages, or other instruments of writing, and will do all such other acts and things as may be reasonably requested for the better carrying into effect of the true intent and meaning of these presents, and for effectuating, completing, and confirming the lien and operation of this mortgage, as an effectual security for all the said five thousand bonds and the coupons accompanying the same, upon all and singular the properties, estates, rights, interests, and franchises hereinbefore mortgaged, or purporting or intended so to be, including as well such of the same as the said company shall hereafter acquire or become possessed of, or entitled unto, as what is now owned or possessed by said company.

Third. And the said party of the first part, for itself and its successors, doth hereby further covenant, grant, and agree to and with the said parties of the second part, as trustees as aforesaid, and for and on behalf of all the future holders of any of the said five thousand bonds hereby secured or intended so to be, and to and with the successors of the parties of the second part in the trust hereby created, that the said party of the first part is now seized and lawfully and absolutely entitled to and possessed as owner of the above mentioned railroads and branches, with all the appurtenances thereof, and all other the things and rights above described and hereby mortgaged or intended so to be, and hath good right, full power, and lawful authority to convey and transfer the same in mortgage to the said parties of the second part, as trustees as aforesaid, and to their successors, heirs, and assigns, in the manner and to the effect aforesaid, for the benefit and security of the holders of the said bonds for four millions of dollars, hereby secured or intended so to be; and that the said party of the first part and its successors shall and will warrant and defend the same unto the said parties of the second part and their successors and assigns, according to the purport and intent of the said

transfer and conveyance thereof to them in mortgage, against the claims and demands of all other person or persons whomsoever lawfully claiming or to claim the same, and that free and clear of and from all former and other grants, conveyances, liens, charges, or incumbrances whatsoever, except as hereinbefore stated.

Fourth. In case of a local change in the line or erections of any part of said railroads or branches, the parties hereto may join in releasing the said land or erections and premises that may be abandoned and not longer required for the due maintenance and operation of said railroads, or for the purposes of the party of the first part: *Provided*, that before or at the same time additional land or erections acquired or made, of at least equal value, shall by the party of the first part be duly conveyed and fully assured to the parties of the second part in aid of the security intended by this mortgage.

Fifth. And it is further agreed that in the event of the said party of the first part failing for the space of ninety days to pay the coupons for the semi-annual interest on any of the said bonds issued under and secured by this mortgage, as the same may become due, after the presentation and demand thereof, then and in that case the whole principal sum mentioned in each and all of said bonds shall forthwith become due and payable, and the lien hereby created for the security and payment thereof may at once be enforced; and said parties of the second part, their survivor, successor or successors, shall, on the request in writing of the holders of a majority of the then outstanding bonds hereby secured, as a Court may order or authorize, take possession of the roads, franchises, and other property hereby conveyed, by themselves or their agents, or by a receiver to be appointed, and may use and operate the same, and receive the earnings and income therefrom, and may institute and maintain foreclosure proceedings in any Court having jurisdiction, and have whatever is herein mortgaged, sold, and conveyed by the direction of the Court; and out of the proceeds from said sale, or from the income and earnings of said property, rights, and franchises (after deducting the expenses incurred in and about said proceedings, the execution of this trust, the preservation and operation of said property, and reasonable compensation to said trustees, their agents and attorneys, the payment of all taxes, levies, and assessments upon said property and upon the income therefrom, all damages to which said parties of the second part or their successors may become liable by reason of the management of said property, and any other proper charge or expense not caused by the willful personal misconduct of said parties

of the second part, their survivor, successor or successors) shall pay said bonds hereby secured, or so many of them as shall then be outstanding, together with all interest then due or owing thereon, paying over the surplus, if any, to said party of the first part, its successors or assigns; or in case the same be not sufficient to pay all said bonds and interest, then shall distribute the same with *pro rata* equality among the holders of all such bonds and coupons: *Provided*, that if said company shall, at any time before a sale and before said bonds become due by the terms thereof, pay all semi-annual interest then matured on any aforesaid bonds, and all said expenses, compensation, taxes, and damages, that then the principal and unmatured interest on such bonds shall be deemed not due by reason of any previous failure to pay interest, and no sale of the property for said previous failure shall be made.

Sixth. It is further agreed that upon the payment at any time in full of the said bonds issued under and secured by this mortgage, and the interest thereon, and the compensation and expenses of said trustees, this deed shall become void, and the estate and title hereby granted shall revert to and vest in said party of the first part, its successors and assigns, without other conveyance thereof; and it shall be vested with and deemed in possession thereof without any entry or other act therefor; and said party of the first part further agrees that it will indemnify and save harmless the said parties of the second part, their survivor, successor or successors, against all loss and damage to which they or either of them may be subjected by the execution of this trust, or by the operation and management of the property hereby conveyed, not caused by the personal misconduct or neglect of such parties of the second part, their survivor or successor.

And it is further agreed that, in the event of the declension, resignation, death, incapacity, or other disability of any trustee of the second part, or their successor or successors, the remaining or surviving trustee or trustees, or successor or successors, may, with the consent in writing of the then president of said company of the first part, or of any corporation which, as its successor, shall be the owner of the railroad hereby mortgaged, appoint, by an instrument in writing, under the hand and seal of such surviving or remaining trustee or successor (which shall be acknowledged and recorded in the office of land records in the several counties through which the railroad hereby mortgaged runs, or in which this deed is by law to be recorded), some competent person to fill such vacancy, and the person so appointed shall possess the powers and incur the obligations of

an original party of the second part hereto; and until such appointment, and notwithstanding such vacancy, such surviving or remaining trustee or trustees or successor shall have full power to execute all the trusts hereby created, and his or their acts shall be as valid as if done by all the parties of the second part hereto; and in case of such appointment said party of the first part covenants to make, upon request, all such deeds and other instruments as shall be necessary or appropriate to enable said party so appointed to execute the trust hereby created, as fully and completely as if such appointed party had been originally one of the parties of the second part.

And this indenture further witnesseth, That the parties of the second part do hereby accept the aforesaid trusts, and agree to execute them upon the following terms and conditions, which are mutually agreed to by the parties, viz: That neither trustee shall be answerable for the acts, omissions, or defaults of the other to which he does not give his assent; that each shall be answerable for gross negligence and wilful defaults only; that the trustees, or either of them, may employ or advise with legal counsel, and that the proper expense thereof, and all the personal expenses of the trustees about the discharge of the trust, and all other reasonable and proper charges and expenses of the trustees, including their compensation, shall be paid by the party of the first part as they are incurred, or otherwise, out of the trust estate on which they are hereby charged; that neither trustee shall be bound to pay or discharge any prior charges or incumbrances on said mortgaged property or estate, nor any part thereof, without being first furnished with the money necessary to make such payments by the persons so requiring, or otherwise; that they shall not be required to act in the execution of these trusts except at their own option, unless requested in writing by the holders of a majority of the outstanding bonds hereunder, nor unless furnished with such funds as their counsel shall reasonably advise them are necessary and proper to enable them to commence proceedings, and also with a responsible indemnity or sufficient agreement to pay the accruing expenses, obligations, and liabilities which they may incur by reason of so acting, and their proper compensation in so doing; that they may employ agents or attorneys in fact to act for them whenever required to act themselves, and shall not be personally responsible for the neglect or default of any such agent or attorney in fact appointed in good faith; and that all covenants and agreements herein contained or implied may be specifically enforced by any court of competent jurisdiction.

In witness whereof, The party of the first part has caused its corporate seal to be hereunto affixed, and this instrument of writing to be subscribed by its president and secretary, and the said trustees subscribe the same to signify their acceptance of said trust, the day and year first above written.

Exhibit No. 3.

NUMBER XXXVIII. — JOINT RESOLUTION APPOINTING COMMISSIONERS TO SETTLE WITH THE LOUISVILLE AND NASHVILLE RAILROAD.

Resolved by the General Assembly of the State of Tennessee, That the comptroller, secretary of the State, attorney-general of the State, and commissioner of public roads of the State of Tennessee, be, and are hereby constituted commissioners on behalf of the State of Tennessee, to meet and make a settlement with the Louisville and Nashville Railroad Company, and make a report thereof to this session of the General Assembly, if practicable; if not, to the next session of the same,

Be it further Resolved, That if such settlement cannot be made by said commissioners, with said Louisvile and Nashville Railroad, as shall be satisfactory to them, the fact shall be made known to the governor of the State, and he may direct the attorney-general of the State to institute such proceedings against said company as may be necessary to protect the interests of the State.

WILLIAM HEISKELL,
Speaker of the House of Representatives.
SAMUEL R. ROGERS,
Dated *May* 5, 1864. *Speaker of the Senate.*

Exhibit No. 4.

SETTLEMENT WITH THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

NASHVILLE, TENNESSEE, *November* 18, 1865.

To the General Assembly of the State of Tennessee:

In obedience to a resolution of your honorable body, entitled "a resolution to appoint commissioners to settle with the Louisville and Nashville Railroad Company," adopted May 5, 1865, the undersigned, as commissioners on behalf of the State, have met the Hon. James Guthrie, president, and Mr. Willis Ranney, secretary of said company, at the State Capitol, for the purpose contemplated in the resolution.

The memorial upon which said resolution is founded, and which, it is said, sets forth the various matters of settlement, has not been furnished to the commissioners, but has been mislaid in one house or the other of the legislature. But from a statement of its contents by Mr. Guthrie, your commissioners are of opinion that the only matter legitimately referred to them, is the indebtedness of said company to the State on account of the aid furnished the company in the shape of bonds loaned to them, and the interest thereon.

It appears from the books of the secretary of State, that said company have, at different times, received the sum of five hundred and sixty thousand five hundred dollars ($560,500) of the bonds of the State, in aid of the construction of their road, and the bridge across the Cumberland, at Nashville. It appears from the books of the comptroller, that the interest on these bonds has been paid up to July 1, 1861. The interest accruing since that time amounts to one hundred and forty-seven thousand one hundred and thirty-one dollars and twenty-five cents ($147,131.25), making the entire indebtedness of said railroad company to the State, seven hundred and seven thousand six hundred and thirty-one dollars and twenty-five cents ($707,631.25). The principal, Messrs. Guthrie and Ranney, on behalf of the said company, proposed to pay over in straight six per cent. coupon bonds of the State, and the interest in coupons of the State now due.

Believing it to be manifestly for the interest of the State to call in this large installment of its indebtedness, and believing, moreover, that the company had a right, under the law regulating the sinking fund, to pay off its entire indebtedness in the bonds of the State, your commissioners accepted the proposal, and executed to the commissioners, on behalf of the company, the following receipt, a duplicate of which is retained in the office of the comptroller:

NASHVILLE, TENNESSEE, *November* 17, 1865.

We, the undersigned, commissioners appointed by the General Assembly of the State of Tennessee, by joint resolution adopted May 5, 1865. "to meet and make settlement, on behalf of the State, with the Louisville and Nashville Railroad Company," have this day met and settled with the Hon. James Guthrie, president, and Willis Ranney, secretary of said company, and have received from them five hundred and fifty-one coupon bonds of the State, for one thousand dollars each ($551,000), nine thousand five hundred dollars ($9,500) in coupons of the bonds of the State now due; also, one hundred and forty-seven thousand one hundred and thirty-one dollars and twenty-five cents ($147,131,-25) in coupons of the bonds of the State, in payment of interest due from said company, accruing since July 1, 1861; making in all, seven hundred and seven thousand six hundred and thirty-one dollars and twenty-five cents, being the total indebtedness of said company to the State of Tennessee, on account of the bonds of the State, received in aid of the construction of said road, and the bridge across the Cumberland River.

Given under our hands, this 17th of November, 1865.

A. J. FLETCHER, *Sec'y of State.*
S. W. HATCHELL, *Comptroller.*
T. H. CALDWELL, *Att'y-General,*
A. W. HAWKINS, *Com. of Roads.*

The bonds and coupons mentioned in said receipt are deposited with the comptroller of the State, and a list of the numbers and amount of the coupons is filed in the office of the secretary of State.

From the statement of Mr. Guthrie, your commissioners are of opinion that the other matters contained in the memorial, grow out of the consolidation of said road with the Edgefield and Kentucky road, by the acts of December 1, 1855, and December 3, 1859, and should be settled by the two companies, unless the latter road should fall permanently into the hands of the State. At any rate, the adjustment of these matters has been waived for the present by consent.

The last installment of interest, amounting to sixteen thousand eight hundred and fifteen dollars ($16,815), was paid by said company into the Bank of Tennessee, on the 9th day of May, 1861, as appears from their receipt. This was two days after the adoption of the Secession Ordinance; but as the law required the payment to be made to the bank, and as your commissioners can not see that the status of the bank was changed at that early day, they consider the

payment legal. The fact that the fund was lost by the bad faith of the bank, does not, in the opinion of your commissioners, furnish any just or legal grounds for recourse on the company.

Respectfully submitted.

A. J. FLETCHER, *Sec'y of State.*
S. W. HATCHELL, *Comptroller.*
T. H. CALDWELL, *Att'y-General.*
A. W. HAWKINS, *Com. of Roads.*

Exhibit No. 5.

STATEMENT SHOWING AMOUNT OF BONDS ISSUED BY THE STATE OF TENNESSEE IN AID OF DIFFERENT RAILROAD COMPANIES, AND WHAT DISPOSITION HAS BEEN MADE OF THE INDEBTEDNESS TO THE STATE IN CASE OF THE SEVERAL RAILROADS.

Sold by Commissioners.

EDGEFIELD AND KENTUCKY R. R.—			
Bonds issued (including $200,000 to E. H. N.)	$1,380,000 00		
Interest funded, January 1, 1866	231,812 00		
Interest unpaid, July 1, 1870	365,220 00		
U. S. claims assumed	130,804 58	$2,107,836 58	
Sold August 26, 1861, for			900,000 00
CIN'TI, CUMB. GAP AND CHARLESTON R. R.—			
Bonds issued	1,373,000 00		
Interest unpaid	242,068 12	1,615,068 12	
Sold October 16, 1871, for			300,000 00
KNOXVILLE AND KENTUCKY R. R.—			
Bonds issued	2,350,000 00		
Interest unpaid	394,380 00	2,744,380 00	
Sold October 10, 1871, for			350,000 00
MCMINNVILLE AND MANCHESTER R. R.—			
Bonds issued	772,000 00		
Interest unpaid	294,037 00	1,066,037 00	
Sold August 15, 1871, for			300,000 00
NASHVILLE AND NORTHWESTERN R. R.—			
Bonds issued	3,222,000 00		
Interest funded, January 1866	396,475 00	3,618,475 00	
Balance interest unpaid, July, 1870			817,725 00
Sold October, 1871, for	2,400,000 00		
ROGERSVILLE AND JEFFERSON R. R.—			
Bonds issued	385,000 00		
Interest funded, January, 1866	38,160 00	423,160 00	
Interest unpaid, July, 1870			96,158 00
Sold March, 1872, for	23,000 00		
WINCHESTER AND ALABAMA R. R.—			
Bonds issued	1,289,000 00		
Interest funded, January, 1866	143,259 00	1,432,259 00	
Interest unpaid, July, 1870			315,309 33
Sold September, 1871	300,000 00		

KNOXVILLE AND CHARLESTON R. R.—		
Bonds issued	710,000 00	
Interest unpaid	85,200 00	
Sold March 22, 1872, for		105,000 00
EAST TENN. AND WEST'N N. CAR. R. R.—		
Bonds issued	400,000 00	
Interest unpaid	36,000 00	
Sold November, 1871, for		20,000 00
MEMPHIS, CLARKSV'LE AND LOUISV. R. R.—		
Bonds issued	1,582,000 00	
Interest funded, January, 1866	312,600 00—	1,894,600 00
Interest unpaid		613,986 00
U. S. Claims assumed		380,756 00
Sold September 28, 1871, for	1,700,000 00	
TENNESSEE AND PACIFIC R. R.—		
Bonds issued	1,165,000 00	
Interest unpaid, July, 1870	71,080 00	
Sold August 8, 1872, for		300,000 00

P. S.—

Total bonds issued to railroads	$29,252,000 00
Of these bonds there have been canceled, about	15,800,000 00
Leaving of the original issuance outstanding, about	14,250,000 00

Roads which have Liquidated their Indebtedness.

EAST TENNESSEE AND VIRGINIA R. R.—			
Bonds issued	$2,202,000 00		
Interest funded, 1866	250,038 55		
	2,452,038 55		
Less sinking fund paid	3,000 00	—$2,449,038 55	
EAST TENNESSEE AND GEORGIA R. R.—			
Bonds issued	1,614,000 00		
Interest funded, January, 1866	180,277 50		
	1,794,277 50		
Less amount sinking fund paid	125,000 00	1,669,277 50	
Total indebtedness of the two above roads, paid August 1, 1870, by East Tennessee, Virginia and Georgia R. R. Co. (consolidated)		$4,118,316 05	
CENTRAL SOUTHERN R. R.—			
Bonds issued	596,000 00		
Interest funded, January, 1866	128,160 00	— 724,160 00	
TENNESSEE AND ALABAMA R. R.—			
Bonds issued	1,069,000 00		
Interest funded, January, 1866	225,016 00	— 1,294,016 00	
NASHVILLE AND DECATUR R. R.—			
Bonds issued		350,000 00	
Total paid by the Nashville and Decatur R. R. Co., March, 1871		2,368,176 00	
MEMPHIS AND CHARLESTON R. R.—			
Bonds issued	1,700,000 00		
Interest funded, January, 1866	185,387 45	— 1,885,387 45	
Less amount paid on sinking fund		213,471 20	
Balance paid, July 25, 1877		1,671,916 25	
MEMPHIS AND OHIO R. R.—			
Bonds issued	2,001,000 00		
Interest funded, January, 1866	395,110 00		
Paid, May 25, 1871	2,396,110 00		
MISSISSIPPI AND TENNESSEE R. R.—			
Bonds issued	398,000 00		
Interest funded, January, 1866	22,800 00	— 420,800 00	
Less amount paid on sinking fund		121,000 00	
Balance paid, January 16, 1878		299,800 00	

MOBILE AND OHIO R. R.—

Bonds issued	1,296,000 00	
Interest funded, January, 1866	388,800 00	
Paid January 1, 1872		1,684,800 00

MISSISSIPPI CENT. AND TENNESSEE R. R.—

Bonds issued	1,124,000 00	
Interest funded, January, 1866	75,180 00	
Paid, December 1, 1877		1,199,180 00

NASHVILLE AND CHATTANOOGA R. R.—

Bonds issued	395,000 00	
By sinking fund paid	30,835 00	
Balance paid, January 1, 1874	364,165 00	

Recapitulation.

DEFAULTING RAILROADS SOLD BY THE STATE COMMISSIONERS.—

Bonds issued	14,628,000 00	
Interest funded, January, 1866	1,122,306 00	
Interest unpaid, July, 1870	3,331,163 12	
U. S. Government claims assumed	511,560 00	19,593,029 12
Amount realized by sale of the above roads (sales bearing date July, 1870)		6,698,000 00

ROADS WHICH HAVE SETTLED THEIR INDEBTEDNESS.—

Bonds issued	12,742,000 00	
Interest funded, January, 1866	1,850,768 00	
Sinking fund paid	493,306 00	
Unaccounted for	1,255,700 00	

STATE OF TENNESSEE,
COMPTROLLER'S OFFICE,

I, Jas. L. Gaines, Comptroller of the Treasury of the State of Tennessee, do hereby certify that the foregoing is a correct statement as shown by the records and books in this office.

Comptroller's Seal.

WITNESS my official seal and signature, at Nashville, this 8th day of April, 1878.

JAMES L. GAINES,
Comptroller.

Name of Railroads that retired their Debts to the State of Tennessee, and Amount of Same, viz.:

East Tennessee, Virginia & Georgia	$ 4,117,000 00
Nashville & Decatur	2,700,000 00
Memphis & Charleston (of which $213,471.00 was paid as sinking fund)	1,875,000 00
Memphis & Ohio	2,396,000 00
Mississippi & Tennessee (of which $120,000.00 was paid as sinking fund)	420,800 00
Mobile & Ohio	1,684,800 00
Mississippi Central	1,199,000 00
Nashville & Chattanooga (of which $20,800.00 was paid as sinking fund)	395,000 00
	$14,787,600 00

Name of Railroads sold out, and Amounts brought by each.

Edgefield & Kentucky	$ 900,000 00
Cincinnati, Cumberland Gap & Charleston	300,000 00
Knoxville & Kentucky	350,000 00
McMinnville & Manchester	300,000 00
Winchester & Alabama	300,000 00
Rogersville & Jefferson	23,000 00
Nashville & Northwestern	2,400,000 00
Knoxville & Charleston	105,000 00
East Tennessee and Western North Carolina	20,000 00
Memphis, Charleston & Louisville	1,700,000 00
Tennessee & Pacific	300,000 00
	$6,698,000 00
	*21,485,600 00
Amount of bonded debt of the State, estimated January 1, 1870, about	40,000,000 00
	$18,514,400 00

*To which is to be added $707,000.00, Louisville & Nashville R. R., which was paid before the date at which the above debt of the State was estimated; hence, it is not deducted, making a total of $21,485,600.00.

UNITED STATES CIRCUIT COURT,

WESTERN DISTRICT OF TENNESSEE.

[*In Equity.*]

CALVIN AMORY STEVENS, on behalf of the Holders of Internal Improvement Bonds of Tennessee, issued to the Memphis and Ohio Railroad Company,

versus

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

The answer of Calvin Amory Stevens to the cross-bill filed by John B. Smith, admitted as a defendant by stipulation :

This complainant, respondent to the cross-bill which he has consented that John B. Smith might file subject to conditions specified in a certain stipulation, for answer to said cross-bill, or so much and such parts thereof as he is advised it is material for him to answer unto, but without waiving any benefit or right of exception thereto that can or may be had to the same on account of the errors, uncertainties and imperfections therein contained, admits the existence of the several statutes, public documents and records and private writings set out

or referred to in the cross-bill, but for greater certainty as to the contents thereof, prays leave to refer to the said documents upon the trial.

Respondent denies each and every allegation in the said cross-bill with actual knowledge of which he is charged; and as to the other matters of fact alleged affirmatively in the said cross-bill, except in the particulars above admitted, respondent has no knowledge or information, and therefore demands strict proof of the same.

And the complainant further says that the telegraphic letter of December 11, 1877, addressed by him to the Governor of Tennessee, and laid before the legislature, was written for his signature by Richard T. Wilson, President of the Memphis and Charleston Railroad Company, and by him procured to be signed by this complainant, and by said Wilson sent to said Governor at a time when this complainant was wholly ignorant of the substitutions now claimed to have been effected, and by which it is alleged that the liens upon the railroads of the defendant company and other companies in the State of Tennessee have been satisfied, and that said telegraphic letter relates to bonds of the State of Tennessee, then held by this complainant, of which only a very small minority in amount were secured or are now claimed to have been secured by any lien whatever.

Respondent is advised that he need not answer or controvert in this pleading the various conclusions of law and presumptions set forth in the cross-bill, but that the same are best answered by the language of the Statutes of Tennessee.

Wherefore this respondent prays to be hence dismissed with his reasonable costs.

E. L. ANDREWS,
GEORGE HOADLY,
Solicitors and of Counsel for Complainant.

UNITED STATES OF AMERICA, }
Southern District of New York. } ss:

On this 28th day of November, A. D. 1879, before me personally appeared Calvin Amory Stevens, who being duly sworn, says that the matters and things stated in the foregoing answer are true, so far as the same are stated of his own knowledge, and so far as stated on information and belief, he believes it to be true.

W. H. DELANCEY,
[L. S.] *Notary Public Westchester County.*
Acting in New York County under and by virtue of Chapter 807 of the Laws of 1873 of the State of New York.

1

Replication of John B. Smith.

U. S. Circuit Court,

SIXTH JUDICIAL CIRCUIT,

WESTERN DISTRICT OF TENNESSEE.

[*In Equity.*]

2

CALVIN AMORY STEVENS, on behalf of the holders of Internal Improvement Bonds of Tennessee, issued to THE MEMPHIS AND OHIO RAILROAD COMPANY,

vs.

3

THE LOUISVILLE, NASHVILLE AND GREAT SOUTHERN RAILROAD COMPANY.

The repliant, saving and reserving to himself all and all manner of advantage of exceptions to the manifold insufficiencies of the said answer, for replication thereunto, says that he will aver and 4 prove his said cross-bill to be true, certain and suffi-

5 cient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true, all which matters and things the repliant is and will be ready to aver and prove as this Honorable Court shall direct, and humbly pray as in and
6 by his said cross-bill he has already prayed.

MATTHEWS, RAMSEY & MATTHEWS,
Solicitors for Defendants.

7

8

UNITED STATES CIRCUIT COURT,

SIXTH JUDICIAL CIRCUIT,

WESTERN DISTRICT OF TENNESSEE.

[*In Equity.*]

CALVIN AMORY STEVENS, EUGENE KELLY, JOHN T. TERRY and PETER GEDDES, on behalf of the Holders of Internal Improvement Bonds of Tennessee, issued to the MEMPHIS & OHIO RAILROAD COMPANY,

versus

THE LOUISVILLE, NASHVILLE AND GREAT SOUTHERN RAILROAD COMPANY.

To the Honorable the Judges of the Circuit Court of thh United States for the Sixth Judicial Circuit and Middle District of Tennessee.

The petition of Eugene Kelly, John T. Terry and Peter Geddes, respectfully shows to your Honors:

That your petitioners are owners and holders of Internal Improvement Bonds issued on account of

5 the Memphis and Ohio Railroad Company for the construction and equipment of its said road.

Your petitioners' said bonds are identified and numbered according to the description in the bill in this suit, and have the like number of overdue and unpaid coupons attached thereto. The schedule hereto attached and prayed to be taken as a part of this petition exhibits their ownership and holdings of said bonds.

Your petitioners likewise constitute a majority of
6 the Committee of Tennessee Bondholders, representing forty-eight owners and holders of Internal Improvement Bonds of Tennessee issued to the Memphis and Ohio Railroad Company, owning and holding one hundred and eighty (180) bonds issued to said company by the State of Tennessee.

Your petitioners desire to unite in the prosecu tion of the bill herein and to be joined as co-complainants according to the frame of this suit and course and practice of this Court, with leave to
7 amend the title and formal allegations of the bill to conform to this petition. A copy of said amendment is hereto attached.

And your petitioners accordingly pray for the foregoing relief, and such other order as may be appropriate in the premises.

EDWARD L. ANDREWS,
Solicitor and of Counsel for Petitioners.

8 UNITED STATES OF AMERICA, } ss:
Southern District of New York. }

On this 19th day of August, A. D. 1879, before me personally appeared Eugene Kelly, John T. Terry and Peter Geddes, who, being duly and severally sworn, says each for himself, that the matters and things stated in the foregoing petition are

true so far as the same are stated of his own knowledge, and so far as stated on information and belief, he believes them to be true. 9

[L. S.] WILLIAM H. DELANCEY,
Notary Public,
Westchester County, acting in New York County under and by virtue of Chapter 807 of the Laws of 1873 of the State of New York.

10

UNITED STATES CIRCUIT COURT,

SIXTH JUDICIAL CIRCUIT,

WESTERN DISTRICT OF TENNESSEE.

CALVIN AMORY STEVENS, EUGENE KELLY, JOHN T. TERRY and PETER GEDDES, on behalf of the holders of Internal Improvement Bonds of Tennessee, issued to the MEMPHIS & OHIO RAILROAD COMPANY, 11

versus.

THE LOUISVILLE, NASHVILLE AND GREAT SOUTHERN RAILROAD COMPANY. 12

On the foregoing verified petition and on motion of Edward L. Andrews, solicitor for complainants.

It is ordered that Eugene Kelly, John T. Terry and Peter Geddes, be and the same are hereby admitted as complainants in this suit, and the for-

13 mal amendments attached to said petition are hereby allowed.

Signed. W. STRONG, *J.*

Aug. 20, 1879.

UNITED STATES CIRCUIT COURT,

SIXTH JUDICIAL CIRCUIT,

WESTERN DISTRICT OF TENNESSEE,

14 *In Equity.*

CALVIN AMORY STEVENS, EUGENE KELLY, JOHN T. TERRY and PETER GEDDES, on behalf of the holders of Internal Improvement Bonds of Tennessee, issued to the MEMPHIS and OHIO RAILROAD COMPANY,

15 *versus.*

THE LOUISVILLE, NASHVILLE AND GREAT SOUTHERN RAILROAD COMPANY.

Amendments to a Bill in Equity: At the end of the word "orator" wherever it occurs in the bill 16 add the letter "s;" and after the name Stevens add the following: "Eugene Kelly, John T. Terry and Peter Geddes."

Make the pronoun and verb to which the word "orators" relates plural instead of the singular number.

EDWARD L. ANDREWS,
Solicitor for Complainants.

CIRCUIT COURT OF THE UNITED STATES.

MIDDLE AND WESTERN DISTRICTS OF TENNESSEE.

C. Amory Stevens *vs.* The Louisville & Nashville Railroad Company *et al.*

Same *vs.* Louisville & Nashville Railroad Company, Nashville & Decatur Railroad Company *et al.*

Same *vs.* Same.

Same *vs.* Louisville & Nashville Railroad Company, Memphis & Ohio Railroad Company *et al.*

Same *vs.* Louisville & Nashville Railroad Company, Memphis, Clarksville & Louisville Railroad Company *et al.*

It is agreed that the following described testimony, so far as relevant and competent, shall be considered as read in each of the foregoing cases, printed copies to be furnished by either of us to the clerk when he makes up the record, as part thereof:

FOR THE COMPLAINANT.

1. Printed stipulation signed E. L. Andrews and Ed. Baxter, as heretofore filed in these causes.

2. Printed stipulation signed by George Hoadly and Stanley Matthews.

3. Printed compilation made up by complainant.

4. Record of proceedings, Davidson County Court, printed.

5. Certificate of cash in State Treasury, printed.

6. Printed statement of prices of State bonds, after January 1, 1870, contained in stipulation of Evarts, Southmayd & Choate, and E. L. Andrews.

7. Depositions of C. Emory Stevens, three in number; also of Eugene Kelly, John T. Terry, George Arents, Ed. Baxter, Wm. H. Osborn, Dempsey Weaver and Albert S. Marks.

8. Two depositions of Richard T. Wilson.

9. Printed copy, order of E. M. Stanton, secretary of War, dated August 8, 1865.

10. Report (printed copy) of Judiciary Committee, W. H. Wisener, Chairman, February 19, 1869, and copy of Senate and House Journal, relative to the bill referred to in said report.

11. Act of February 9, 1850, sections 1 to 3 inclusive.

FOR THE RESPONDENTS.

Nos. 1 and 2 as above, being the two printed stipulations above referred to.

3. Printed compilation made up by respondents.

4. Printed record of foreclosure in the Chancery Court at Nashville of The State *vs.* The Memphis, Clarksville and Louisville Railroad Company, all objections on account of its being an incomplete record being waived.

5. Pages 128 to 177, both inclusive, of the printed report of James L. Gaines, Comptroller of the State of Tennessee, to the Forty-first General Assembly of the State of Tennessee, made January 6, 1879.

6. Printed depositions of John C. Brown, Maney Bell, Samuel R. Cruse, John S. Claybrooke, R. C. Jackson, John J. Craig, Campbell Wallace, Neil S. Brown, Columbus Powell, Albert Roberts, D. B. Cliffe, J. W. Drexel, V. K. Stevenson, J. G. M. Ramsey, B. O. White, John M. Fleming, Ira P. Jones, Peter Geddes, J. D. Porter, M. T. Polk and James L. Gaines. The last three were taken by Hon. James Fentress.

The foregoing depositions are such as have been taken in various cases brought by the complainant against the foregoing and other railroad companies in Tennessee.

Also, all depositions and other documentary testimony heretofore filed in the cases named in the caption of this agreement.

While it is agreed that the foregoing depositions and documents may be filed in these cases, it is expressly understood that to make them, or either of them, or any part of either of them, competent in these cases, the testimony must be competent and relevant in these particular cases, and that no special exceptions need be taken to point out out the irrelevant and incompetent testimony, but its admissibility may be pointed out and relied upon in argument or brief, both in the Circuit and Supreme Court.

It is also expressly understood that where any fact is agreed upon in the stipulation signed by Andrews and Baxter, or in the stipulation signed by Matthews and Hoadly, referred to above, it shall not be affected by anything contained in the depo-

sitions or other documentary proof agreed to be filed in this stipulation.

It is further agreed that the record of the exhibits and testimony aforesaid shall be made up by the clerk in any one of those causes, and that the same shall be treated, regarded and considered as the record of the exhibits and testimony in each and all of the said causes, and that upon appeal to the Supreme Court of the United States a single transcript of the record of said exhibits and testimony so made up may be filed as the record of said exhibits and testimony in each and all of said causes, without filing or docketing any other record except the proper record in each cause so appealed of the pleadings, process, orders and decrees and action and testimony therein other than that contained in said record of said exhibits and testimony.

GEO. HOADLEY,
Solicitor for Complainant.

STANLEY MATTHEWS,
For John B. Smith and others, Defendants.

ED. BAXTER,
Solicitor L. & N. R. R. Co., N. & D. R. R. Co. Mem. & O. R. R. Co., Mem., C. & L. R. R. Co.

NASHVILLE, May 7, 1880.

IN THE

UNITED STATES CIRCUIT COURT,

For the Middle District of Tennessee.

IN EQUITY.

Calvin Amory Stevens, Eugene Kelly, John T. Terry and Peter Geddes, on behalf of holders of Internal Improvement Bonds of the State of Tennessee issued to railroads,

vs.

The Louisville & Nashville Railroad Company,

and

Fifteen other suits on behalf of bondholders, against Fifteen other Railroad Companies.

SOME OF THESE SUITS ARE PENDING IN THE EASTERN, SOME IN THE MIDDLE, AND OTHERS IN THE WESTERN DISTRICT OF TENNESSEE.

OPINION BY S. L. WITHEY, DISTRICT JUDGE, WESTERN DISTRICT OF MICHIGAN.

SEPTEMBER 25th, 1880.

These are suits in equity pending in the Circuit Courts of the United States for the Districts of Tennessee, brought by complainants on behalf of holders of Internal Improvement Bonds of the State of Tennessee against various railroad companies to whom the bonds were issued, to aid in the construction of their several

lines of railroads, and against all other persons interested.

They were argued together in April and May last at Nashville.

The object of the suits is to have a lien in favor of the bondholders declared and established upon the railroads of the several defendant companies, and a Receiver appointed for the collection of the accrued and accruing interest, the interest having been in default since July 1st, 1875. The principal is not due.

The plaintiffs' contention is, briefly, that the Acts passed by the Legislature of the State of Tennessee in 1852, to grant aid to the railroad companies by a loan to them of the bonds of the State, imposed a lien upon the railroads, as security to the holder of the bonds and to the State—payment to the holder would operate as indemnity to the State. Inasmuch as the State and the companies are in default in the payment of the interest since July, 1875, the bondholders by these suits seek to have a lien in their favor established upon the roads.

Statement.

The General Assembly of the State of Tennessee passed, February 11, 1852, an Act known as the "Internal Improvement Act of the State of Tennessee," extending aid to railroad companies by a loan of State bonds, the proceeds to be used in ironing and equipping the roads. Prior to the time of passing the Act, there had been issued State bonds for various purposes, of which above three and a half million dollars were outstanding. The State of Tennessee was now in good credit, her six per cent. bonds brought a premium in the money markets of the world, as did also, subsequently, her bonds issued to the defendant railroad

companies under the Act in question, and Acts amendatory thereof, which bonds are the subject of controversy in these suits. The scheme of internal improvement now adopted was to issue to each Company six per cent. bonds to the amount of eight thousand dollars a mile in installments—afterwards extended to ten thousand dollars,—the first when a section of thirty miles of road was completed ready for the ties, and the subsequent installments upon completion of each additional section of twenty miles; afterwards changed to ten miles. The bonds are transferable by delivery, run not less than thirty nor more than forty years from the respective dates of issue. The interest matures semi-annually, and, with the principal, is payable in New York. They were paid to the railroad company and old in open market without endorsement or guarantee. The State was invested by the terms of the statute with a lien upon each section of the company's road as soon as the bonds for that section were issued, and upon final completion of the road such lien was to attach to the entire road and its equipments. The company was to be incapable of creating any lien conflicting with that in favor of the State.

The amount of the lien claimed by complainants in behalf of such bondholders upon all the railroads is about fifteen million dollars. The litigation, however, affects the holders of between thirty and thirty-five million dollars of other mortgage bonds secured upon these roads and issued under authority of the General Assembly conferred in 1869–70 to enable the aided companies to repay to the State the bonds loaned to them. The holders of the last-mentioned bonds claim to have a first lien upon the roads, and appear in these suits, with the defendant companies, to contest the lien

claimed by complainants and their associate bondholders.

The interest of the State debt was in default from July, 1861, to 1866, during the Civil War, when the price of her bonds had depreciated in value to less than fifty per cent. of their face. The storm of war left the railroads of the State without money, credit or rolling stock, and their roads and bridges going to decay. The first Legislature of Tennessee, after the storm had passed, assembled in 1865, when the State and the railroad companies were alike in a condition of bankruptcy. Provision was now made by the State to fund all her over-due bonds and interest coupons outstanding into new bonds. In 1866 and 1867 the State issued additional bonds to some of these railroad companies to aid them to build bridges and repair their roads, the State reserving a lien and imposing terms and conditions like those in the act of 1852, but somewhat modified.

In 1869–70 none of the principal of the railroad aid bonds issued under the acts of 1852, or acts amendatory thereof, had matured, but now the General Assembly of the State, to enable the respective companies to repay any part of the principal of their indebtedness for bonds loaned to them, passed an act permitting payment in any of the outstanding bonds of the State.

To obtain money to purchase State bonds for surrender, they were severally authorized to issue mortgage bonds upon their respective roads and equipments corresponding in denomination with the State aid bonds, and deposit them with the Comptroller of the State, to be by him delivered to the company or its agent whenever, and as Tennessee State bonds were by the company surrendered and cancelled. These mortgage bonds were by law declared to be a first lien on the road and equipments of the company issuing them,

and as evidence to the purchaser the Comptroller was required to and did certify upon each bond that it was "secured by first mortgage."

Many of the companies availed themselves of this legislation, and under its sanction and authority an aggregate of between thirty and forty million dollars of such mortgage bonds were by the companies issued and sold, and are now outstanding.

Other railroad companies did not avail themselves of the provisions of the law of 1869-70. They continued to be in default as to the payment of interest, and as to payment annually into the sinking fund required by statute. Proceedings by the State were therefore commenced in the State Court of Chancery, and decrees of foreclosure and sale obtained.

At the sale the State was purchaser. These foreclosed roads were subsequently sold by the State and new companies organized. Payment by the purchaser was made to the State in any outstanding Tennessee State bonds at their face value, and the purchaser was invested with all the right and title of the State.

The State, as before stated, had funded her over-due bonds and interest coupons into a new bond under the law of 1865, and in February, 1870, another act was passed to again fund unpaid interest that had accrued on the public debt, together with the floating debt of the State, and all that might become due up to 1874. Holders of Tennessee bonds, including holders of internal improvement bonds issued to railroad companies, generally accepted the provisions thus made for retiring over-due interest coupons, as they had done under the act of 1865. The State of Tennessee however, again defaulted in her interest January, 1, 1875,

and subsequently openly repudiated her bonded debt, for the payment of which the faith and credit of the State were solemnly pledged.

The Statute.

The Internal Improvement Act of February 11, 1852, will alone be referred to, as it contains all the provisions necessary to be considered. The lien is declared by the third section which is as follows:

"That so soon as the bonds of the State shall have been issued for the first section of the road as aforesaid, they shall constitute a lien upon said section so prepared as aforesaid, including the road-bed, right of way, grading, bridges, and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes and equipments, when purchased and delivered, and the State of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with the said lien or mortgage without a deed from the company, for the payment by said company of said bonds, with the interest thereon as the same becomes due."

The requirement, by section five, as to the payment of interest is, that fifteen days before it falls due the company shall deposit in the bank of Tennessee—the State's fiscal agent—

"an amount sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that said interest has been paid or provided for, and if said company fail to deposit said interest as aforesaid, or furnish the evidence as aforesaid, it shall be the duty of the Comptroller to report that fact to the Governor,"

who is immediately to put the road into the hands of a Receiver to operate it in behalf of the State until the default is made good, and then to surreuder the road to the company.

By the section,

"The Comptroller is authorized, and it is made his duty upon his warrant to draw from the treasury any sum of money necessary to meet the interest on such bonds as may not be provided for by the company as provided for in in this act, and the Comptroller shall report thereof to the General Assembly from time to time."

The requirement as to the payment by the company of the principal of the bonds by section seven is:

"That at the end of five years after the completion of said road, said company shall set apart one per centum per annum upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the company shall pay into the treasury of the State, after assigning them to the Governor, and for which the Governor shall give said company a receipt, and as between the State and said company, the bonds so paid in shall be a credit on the bonds issued to the company. And bonds so paid in and the interest accruing thereon, from time to time, shall be held and used by the State as a Sinking Fund for the payment of the bonds issued to the company, and should said company repurchase any of the bonds issued to it under the provisions of this act, they shall be credited as aforesaid and cancelled. And should said company fail to comply with the provisions of this section, it shall be proceeded against, as provided in the fifth section of this act."

viz, as in case of failure to meet installments of interest.

It will be noticed that as these bonds were to be issued in installments at different periods, they would therefore fall due at different times.

The sixth section provides:

"That if said company shall fail or refuse to pay any of said bonds when they fall due, it shall be the duty of the Governor to notify the Attorney General of the district in which is situated the place of business of said company, of the fact; and thereupon, said Attorney General shall forth-

with file a bill against said company in the name of the State of Tennessee, in the Chancery or Circuit Court of the county in which is situated said place of business, setting forth the facts, and thereupon said Court shall make all such orders and decrees in said cause as may be deemed necessary by the Court, to receive the payment of said bonds, with the interest thereon, and to indemnify the State of Tennessee against any loss on account of the issuance of said bonds, by ordering the said railroad to be placed in the hands of a receiver, ordering the sale of said road, and all the property and assets attached thereto or belonging to said company, or in such other manner as the Court may deem best for the interest of the State."

By section twelve,

"the State of Tennessee expressly reserves the right to enact by the Legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interest of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of this act; but in such manner as not to impair the vested rights of the stockholders of the companies."

What the parties claim.

Complainants contend that the statutory lien is to be regarded as an instrument of security taken for the benefit of the bondholders; or more fully stated, that the legislation and action of the State under it were effectual to fix upon the railroads respectively a lien not merely for the indemnity of the State of Tennessee, but also to secure the payment of its bonds to their holders; that the State became trustee of this lien for the benefit of the holder of the bonds, which lien inured to their benefit as *cestius que trusent* of the State, by force of the express contract to that effect in the law creating the security, as well as by necessary legal implication from the relations of the parties, which no subsequent dealings between the railroad companies and the State could discharge. Again it is said:

"the first or primary object of the act was to compel each aided company to pay its debt directly to its true creditor, the lender on the bonds. This was effected by the usual and proper process, a lien pure and simple for the payment of the bonds upon the estate of each aided company enforcible in equity in case of default."

On the other hand defendants' answers state the opposing view thus:

"that the said statutory mortgage was taken by the State in its own behalf and for its own benefit, and not as trustee for its bondholders, and that said statutory mortgage was conditioned solely for the payment by the Company to the State of the company's indebtedness to the State for the bonds loaned to it, and in respect of both principal and interest such payment was conditioned to be made by the company to the State before the corresponding amount of interest or principal would become due or payable by the State to the holders of the State bonds: * * * that by the statute two entirely independent and distinct debts were created, one from the State to the bondholders upon its bonds payable to bearer, resting upon the faith and credit of the State, the other an indebtedness from the railroad company to the State for the amount of the State bonds loaned to it, and that the statutory mortgage was given to secure this latter direct obligation from the railroad company to the State, with which the bondholders had no connection or concern."

It is further said that whether the engagement of the company was to pay to the State or to holders of the bonds is not important, and that if under the terms of the act it shall be held that the companies were to make payment to the bondholders, such payment was to be merely in relief of the State from the ultimate performance of its obligation—but all the while the obligation of the State remained—was to be in exoneration of the State but did not modify its undertaking on the bond and created no privity between the bondholders and the company. That such an undertaking by the company would be to indemnify the State by payment of the

bond in its stead, and that the obligation was to the State alone, and one in which no one else had or was intended to have any legal or equitable interest, much less any direct participation and right of intervention or control. That the relation between the railroad company and the holder of State bonds was that merely of vendor and purchaser of negotiable securities, passing by delivery and without endorsement and therefore created no relation between them of debtor and creditor.

Opinion.

I cannot refrain from expressing personally and officially my acknowledgements for the complete and exhaustive arguments by learned and eminent counsel which distinguished the hearing and submission of these important cases. I approach their consideration with all the aid which the most consummate and elaborate arguments can afford. The opinion will not extend over all the debated ground.

Have the holders of internal improvement bonds, loaned by the State of Tennessee to a railroad company, under the act in question, any enforcible right by contract or otherwise in the statutory lien that is reserved to the State of Tennessee for the payment of the principal and interest of the bonds as they matured? Section three provides:

"That so soon as the bonds of the State shall have been issued for the first section of the road as aforesaid, they shall constitute a lien upon said section * * * and the State of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with said lien * * * for the payment by said company of said bonds, with the interest as the same becomes due."

This section of the statute relates only to the first division of thirty miles, but the lien there declared is

by another part of the act applied and extended to each additional section of twenty miles as fast as completed, and finally to the entire road as security

"for the payment of all bonds issued to the company" (Sec. 4).

The lien upon the property of the company was effected by virtue of the statute upon the issue of the bonds by the State and their acceptance by the company. Unless an intention of the Legislature to secure the purchaser of the bonds can be implied from the act and the dealing of the parties, the claim of complainants to the relief asked in these suits rests upon a mere equity. There is no denial that it was the State of Tennessee which was invested with the lien, but it is said that she occupies the position of a surety holding security for the payment of the debt, which security the creditor—the bondholder—can upon default of the principal debtor—the railroad company—avail himself in equity; that default by the company and by the State in the payment of the interest having occurred, the State becomes and is a trustee of this lien for the benefit of the bondholder. It was the State and the railroad company that dealt together in this matter. The State dictated the terms upon which it would grant aid, and the company accepted those terms without reference to what the purchaser of the bonds would say or claim. The bonds were loaned by the State and passed over to the company to be sold for money to aid or accommodate the company. The bonds were accepted by the company upon the understanding and agreement: 1. That the state was invested with a lien upon the company's railroad and property to secure "the payment by said company of said bonds, with the interest thereon as the same becomes due." 2. That the inter-

est should be paid by the company to the financial agent of the State at least fifteen days before it should become due, or satisfactory evidence be produced that it had been paid or provided for; and 3, that the principal of the bonds should be paid by the company by means of a sinking fund in the State Treasury, created by the purchase and deposit therein of Tennessee interest bearing bonds, supposed to be adequate for the purpose of enabling the State to meet its bonds at maturity.

There is nothing in any of these stipulations out of which the relation of the State to the bondholder is changed from that of a principal debtor to a surety. Nor does it appear how the company becomes debtor to the bondholder in any degree whatever. There is no express promise on its part to the bondholder, nor is any contract relation implied between him and the company. Section three contains no language importing such promise. It declares merely that the State of Tennessee shall be invested with a lien for the payment of the bonds by the company. The State imposes the lien if its aid is accepted, and as a condition of the grant. The language may imply a promise by the company accepting the aid to pay the State, but there is no obligation of the company to pay the bondholder, resulting either from positive law or from contract express or implied.

The lien was clearly "reserved in favor of the State." It was the State of Tennessee that upon the issuance of the bonds was invested with the lien or mortgage without deed. No other lien could have priority over or come in conflict with the lien of the State. The company was to deposit the interest money and exchange with the State's fiscal agent at least fifteen days before it became due, or satisfactory evidence that the interest had been paid or provided. All the suits and proceed-

ings under the Act are given as remedies exclusively to the State. The State might have a decree and sell the road for non-payment of any bond. The bond was made by the State for the accommodation of the railroad company and was sold in open market, without any promise by the company, other than what is implied to the State by accepting the benefit of the Act.

There is no express declaration of trust on the part of the State. It is sought to raise a trust out of the language of the Act, and the principle is invoked applicable to a security given by a debtor to his surety conditioned that it shall be void if the mortgagor pays the debt on which the mortgagee is surety, viz: that in such case the mortgage will be held both as an indemnity to the surety and as a security for the debt; the surety being regarded in equity as trustee for the benefit of the creditor and as having no right to discharge or defeat the trust, unless it be to a purchaser for a valuable consideration without notice.

The rule is not questioned. But it is not conceived that this rule would control the express terms of a mortgage or other instrument of security, nor render wholly nugatory the effect of an express reservation of a right of disposition of the mortgaged property by the mortgagee as is provided in the statute under consideration.

It is not within the province of equity to import conditions into the mortgage. The conditions of this statutory lien were, that the company should deposit the interest money and exchange with the State's fiscal agent or furnish evidence of prior payment, and should also pay into the treasury the means of providing a Sinking Fund for the ultimate payment of the bonds. This dealing was to be with the State—as to the payment of the principal it must have been—as to the pay-

ment of interest it was optional with the company—and there being no express covenant by the company a compliance with the conditions named in the mortgage would discharge the lien.

We do not overlook a claim made by one of complainants' counsel, that the intention of the Legislature is to be ascertained by the language of the statute declaring the lien, but we think the statute must be construed together, and that the requirements put upon the mortgagor—the conditions of his mortgage—when read in connection with the declaration, many times repeated in the statute, that the lien is the lien of the State, should have great weight in determining the legislative intention. The meaning of the legislation is to be declared from the words and subject matter of the statute. It is the scope and meaning of the whole enactment, rather than the literalism of words and phrases that are to govern; the signification of the entire Act and not a single clause determines the intention of the law maker. Thus section six, considered with other provisions of the Act, is important as reserving to the State the right through proceedings in Court to sell the road, thereby discharging it from the lien imposed by the statute.

The fact that the State might discharge the lien in such way imports that there was no intention of the law makers to give a beneficial interest in the security to any one but the State. This view applies with peculiar force where the holder of the security is a State not amenable to the ordinary process of Courts.

This view of the effect of section six upon the construction as to legislative intent is not weakened but fortified by section fourteen, which declares that

"in the event any of the roads shall be sold under the provisions of the Act, it shall be the duty of the

Governor to appoint an agent for the State to attend the sale, and, if necessary to protect the interests of the State, buy in the road in the name of the State; and in case the State shall be the purchaser, the Governor shall appoint a Receiver who shall take possession of the road and property, and use the same as provided for in the fifth section of this Act, and said Receiver shall settle his accounts semi-annually with the Comptroller until the next meeting of the General Assembly."

This section imports three things at least as to a sale: 1, a third person may be a purchaser; 2, the State may be the purchaser; 3, that the purchaser obtains a title discharged of the lien. It is manifest that if a stranger buys he takes title freed from all liens imposed by the act upon the property, and there is nothing in the language of the section or in the act to indicate that the State, becoming purchaser, does not take the property equally free from such lien.

The Receiver appointed by the Governor is to take possession of the road and "use the same as provided for in the fifth section," that is, in like manner, viz.: "run the same and manage the entire road." This he is to do until the next meeting of the General Assembly, when by clear implication the future management or disposition of the road is left to legislative action.

The contract between the State and the company is that the State shall have a lien "for the payment by said company of said bonds," but it is nowhere required by the State, and therefore not assented to by the company, that the latter shall pay *to the bondholder*. It was urged that this language imports payment by the company to the only person then entitled to ask or enforce it. The language must, however, be understood to relate to other parts of the statute which prescribes specifically the manner of payment by the company, viz.: payment annually into the State Treasury of a sum to be employed as a sinking fund.

It is made optional, by section five, with the company, whether it will deposit the interest as it becomes due with the fiscal agent of the State or pay the same to the bondholder, and by section seven the principal was to be paid by setting apart annually after five years from the completion of the road a certain per centum of the amount of bonds issued to the company, invested in any bonds of the State and assigned to the Governor. This sinking fund provision would, within the period which the bonds had to run, place in the treasury of the State an amount sufficient to nearly or quite enable the State to pay the bonds. The Tennessee bonds were generally six per cent., and funded in those the time required would be thirty-three years and two months.

There is nothing in the act to indicate that after the company has complied with these provisions as to interest and sinking fund, and has thus provided the State with the means of payment, that the company was also required to pay to the bondholders. Certainly this was not the condition of the security, as the only way in which a default could occur was by failure of the company to provide for payment of the interest and principal in those specified ways.

But it is said the Sinking Fund was not to be commenced until five years after the particular road should be completed, and that that event might not take place at all or not till half or more of the time which the bonds had to run had expired, so that the period might be wholly inadequate in which to provide a sufficient Sinking Fund for paying the bonds when due, and that this indicates that the lien was not intended as security merely for payment by the company to the State by means of a Sinking Fund in the manner provided. A statute must be construed from the standpoint, the circumstances and surroundings of the lawmakers when

it was enacted; and it would be unjust and repugnant to reason and common experience to assume that the Legislature passed the act in the expectation that the roads would never be finished or would not be completed within a reasonable time. Besides section twelve reserved to the State ample powers to make such modifications in relation to the time for the Sinking Fund to commence and the per cent. annually to be paid into that fund as would fully protect the interests of the State against delay on the part of the railroad company.

Whatever might be said in regard to the evidence, adduced in these cases, of contemporaneous construction through the utterances of State officials in public documents, the action of any department of the State government or otherwise, there is, in the judgment of the court, nothing to change the views which have been expressed.

Chamberlain *v.* St. Paul and Sioux City R. R. Co., 92 U. S., 299, was decided upon a statute and upon facts similar to those in the present cases and is very instructive. The State of Minnesota by a constitutional amendment provided for an issue of its bonds as a loan to the Southern Minnesota Railroad Company, and required such company to convey the lands in question "in trust for the better security of the Treasury of the State from loss on said bonds," and further provided that if the borrowing company should make default in payment of either the principal or interest of the bonds issued by the State, the Governor should proceed to sell the lands held in trust by the State. The company accordingly executed a trust conveyance of the lands to the State, conditioned for the payment of the principal and interest of the bonds issued to that company. The company made default in the payment of interest. The State foreclosed and became the purchaser of the lands which she granted to another corporation, the de-

fendant in the Chamberlain suit. Chamberlain was holder of some of the State bonds, the payment of which was secured by the trust conveyance, and sought to have a lien upon the land declared in his favor.

In the cases at bar, as in that case, the State was primarily liable to the holder of the bonds. In the cases at bar, as in that case, the State reserved to itself the right of foreclosure and disposition of the property. In deciding that case, Justice Field after stating the position of the complainant, viz.: "that the interest which the State took under the trust deed and mortgage was only the right to hold them as security against loss upon its bonds, * * * that this interest was not changed by foreclosure of the mortgage and by purchase of the property by the State," uses the following language:

"The State was primarily liable to the bondholders; and it was only between her and the company that the relation of principal and surety existed.

It may be doubted whether the bondholders could call upon the company in any event. The endorsement made by the President simply transferred the bonds; it was not the act of the company. Be that as it may, whatever right the plaintiff had to compel the application of the lands received by the State to the payment of the bonds held by him, it was one resting in equity only. It was not a legal right arising out of any positive law or any agreement of the parties. It did not create any lien which attached to and followed the property. It was a right to be enforced if at all only by a Court of Chancery against the surety. But the State being the surety here, it could not be enforced at all, and, not being a specific lien upon the property, cannot be enforced against the State grantees."

This was said to be the law of that case, even if the bondholders could have called upon the company for payment. But laying this feature aside, the analogies are as before stated, and whatever right the plaintiffs

have to claim benefit from the security rests here as in that case as a mere equity; there was no legal right because the law did not impose one, and the company made no promise to the bondholders. Such equity created no lien which followed the property; the liability of the State was to the bondholder. She held no relation as surety to him; as in the Chamberlain case, it was only as between her and the company that in any possible view the State could be regarded as surety, and this view would make it necessary to treat the company as the principal debtor to the bondholder, whereas the company was not the principal debtor, nor indeed a debtor to the bondholder in any degree.

The reasoning in the case of Hand *v.* R. R. Co., in the Supreme Court of South Carolina—manuscript—referred to on the argument, cannot all be adopted as applicable to these cases if the conclusions might be.

It is not upon its fact authority. The railrond company made its own bonds and the State guaranteed their payment to the holder by endorsement. The State was secured by a lien upon the company's road, reserved by the statute which authorized the guarantee. As a surety the State assumed contract obligations to the creditor—the bondholder. If a creditor has a right to claim the benefit of security given by the debtor to his surety for the latter's indemnity, it does not follow that the right exists where the principal debtor takes the security from the accommodatee and where the security holder holds no other relation to the creditor than that of debtor, and the giver of the security is neither a debtor or surety to the creditor.

It becomes unnecessary to further consider the effect of the reservation of power to the State under section twelve. The court has already stated that such re-

served power is ample to authorize a modification of the sinking fund provisions, as has been done by increasing the amount to be paid annually into the Sinking Fund, and changing the time for such payment to commence.

It follows that by this judgment neither the foreclosed or the non-foreclosed roads are subject to any lien in favor of the holders of internal improvement bonds issued by the State of Tennessee, under the acts passed by that State, and to which reference has been made.

Other topics presented in the arguments need not be considered.

A decree will be entered in each case, dismissing the bill of complaint therein, with costs to defendants, and it is directed that such decrees be drawn and presented for approval.

Decree.

U. S. Circuit Court,

SIXTH JUDICIAL DISTRICT,

WESTEN DISTRICT OF TENNESSEE.

[*In Equity.*]

CALVIN AMORY STEVENS, EUGENE KELLY, JOHN T. TERRY and PETER GEDDES, on behalf of the holders of Internal Improvement Bonds of TENNESSEE, issued to the MEMPHIS & OHIO RAILROAD COMPANY,

vs.

THE LOUISVILLE, NASHVILLE AND GREAT SOUTHERN RAILROAD COMPANY.

This cause came on to be heard upon the bill of complaint, the answers thereto, the answer and cross-bill of the defendant, John B. Smith, the answer of the complainant thereto, the replications and the proofs, and was argued by counsel for the respective parties. And the Court now being fully advised thereon finds:

5 *First*—The equity of the cause to be with defendant.

Second.—That the complainant is not entitled to the relief prayed for.

Third.—That the deeds of trust and mortgages set forth in the answer and cross-bill of the said John B. Smith, made to the said Smith and the said Alexander and the said Vail, are, in respect to the claim of the complainant and all other holders
6 of the bonds of the State of Tennessee, originally loaned by said State to the Memphis & Ohio Railroad Company the best and only liens and incumbrances on said property therein described, and,

Fourth.—That in respect to the right and title of the said John B. Smith, as trustee under the same, and the equity of the holders of the bonds thereby intended to be secured, the lien originally reserved
7 by the State of Tennessee on account of its bonds loaned to the Memphis & Ohio Railroad Company has been effectually discharged and released.

It is therefore ordered, adjudged and decreed that the bill of complaint of the complainant be, and the same is hereby dismissed, and that the said John B. Smith, as trustee, under said deeds of trust and mortgages, be forever quieted in his said right and title under the same against theclaim of the complainant and all other holders of the bonds of the State
8 of Tennessee originally issued to the Memphis & Ohio Railroad Company, and that they be and are hereby perpetually enjoined from hereafter, contrary to this decree, setting up their claims aforesaid.

And it is further ordered adjudged and decreed that the said complainant pay to the defendants the costs of this suit, to be taxed and, that defendants have execution therefor.

And thereupon came the complainants at the same time, and prayed an appeal from the foregoing decree, which appeal is allowed, and the amount of the penalty of the bond to be given by them is fixed at one thousand dollars.

Settled and approved, this 30th, day of October, A. D. 1880.

S. L. WITHEY,
Dist. Judge,
West. Dist. Mich.

5 *First*—The equity of the cause to be with defendant.

Second.—That the complainant is not entitled to the relief prayed for.

Third.—That the deeds of trust and mortgages set forth in the answer and cross-bill of the said John B. Smith, made to the said Smith and the said Alexander and the said Vail, are, in respect to the claim of the complainant and all other holders
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It is therefore ordered, adjudged and decreed that the bill of complaint of the complainant be, and the same is hereby dismissed, and that the said John B. Smith, as trustee, under said deeds of trust and mortgages, be forever quieted in his said right and title under the same against theclaim of the complainant and all other holders of the bonds of the State
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S. L. WITHEY,
Dist. Judge,
West. Dist. Mich.

Supersedeas Bond.

U. S. CIRCUIT COURT,

SIXTH JUDICIAL CIRCUIT,

WESTERN DISTRICT OF TENNESSEE.

[*In Equity.*]

CALVIN AMORY STEVENS, EUGENE KELLY, JOHN T. TERRY and PETER GEDDES, on behalf of the holders of Internal Improvement bonds of Tennessee, issued to the MEMPHIS AND OHIO RAILROAD COMPANY,

vs.

THE LOUISVILLE, NASHVILLE AND GREAT SOUTHERN RAILROAD COMPANY.

Know all men by these presents, that we, Calvin Amory Stevens, Eugene Kelly, and John T. Terry, residents of the City and State of New York, and Peter Geddes, resident of the City of Brooklyn, in the State of New York, and Eugene Plunkett and Solon Humphrey, residents of the City and State of New York, are jointly and severally held and firmly bound unto the Louisville and Nashville Railroad Company in the sum of one thousand dollars each,

Supersedeas Bond.

U. S. CIRCUIT COURT,

SIXTH JUDICIAL CIRCUIT,

WESTERN DISTRICT OF TENNESSEE.

[*In Equity.*]

CALVIN AMORY STEVENS, EUGENE KELLY, JOHN T. TERRY and PETER GEDDES, on behalf of the holders of Internal Improvement bonds of Tennessee, issued to the MEMPHIS AND OHIO RAILROAD COMPANY,

vs.

THE LOUISVILLE, NASHVILLE AND GREAT SOUTHERN RAILROAD COMPANY.

Know all men by these presents, that we, Calvin Amory Stevens, Eugene Kelly, and John T. Terry, residents of the City and State of New York, and Peter Geddes, resident of the City of Brooklyn, in the State of New York, and Eugene Plunkett and Solon Humphrey, residents of the City and State of New York, are jointly and severally held and firmly bound unto the Louisville and Nashville Railroad Company in the sum of one thousand dollars each,

to be paid to the said Louisville and Nashville Rail road Company and their successors; for which payments well and truly to be made, each of us doth hereby bind himself, his heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of December, in the year of our Lord one thousand eight hundred and eighty.

Whereas, lately at a regular term of the Circuit Court of the United States, in and for the Western District of Tennessee, held by counsel of all parties to the record, at the City of Nashville, in the said State, a final decree was rendered in the above-entitled cause, dismissing the complainants' bill out of the said Court.

And an appeal from said decree to the Supreme Court of the United States was prayed on behalf of complainants in said suit, namely: Calvin Amory Stevens, Eugene Kelly, John T. Terry and Peter Geddes, which appeal was granted and the order granting the same was filed with the clerk of said Circuit Court.

Now, the condition of the above obligation is such that if the said Calvin Amory Stevens, Eugene Kelly, John T. Terry, and Peter Geddes shall prosecute the said plea to effect, and answer all damages and costs if they fail to make the said appeal good then the above obligation to be void, else to remain in full force and virtue.

CALVIN AMORY STEVENS, [L.S.]
EUGENE KELLY, [L.S.]
P. GEDDES, [L.S.]
JNO. T. TERRY, [L.S.]
EUGENE PLUNKETT, [L.S.]
SOLON HUMPHREYS, [L.S.]

UNITED STATES OF AMERICA, } ss. :
Southern District of New York. }

On this 29th day of December, 1880, before me personally appeared Calvin Amory Stevens, Eugene Kelly, Peter Geddes, John T. Terry, Eugene Plunkett and Solon Humphreys, to me known and known to me to be the same persons described in and who executed the foregoing bond, and severally acknowledged to me that they executed the same.

WILLIAM H. DELANCEY,
[L.S.] *Notary Public*,
Westchester and N. Y. Co's.

UNITED STATES OF AMERICA, } ss. :
Southern District of New York. }

CALVIN AMORY STEVENS, being duly sworn and examined, deposes and says: I am one of the bondsmen named in the foregoing bond, and I am worth the sum of two thousand dollars over and above all my debts and liabilities, and property exempt by law from execution.

CALVIN AMORY STEVENS.

Sworn to before me, this 29th day of December, 1880.

WILLIAM H. DELANCEY,
[L.S.] *Notary Public*,
Westchester and N. Y. Co's.

UNITED STATES OF AMERICA, } ss :
Southern District of New York. }

EUGENE KELLY, being duly sworn and examined, deposes and says: I am one of the bondsmen named in the foregoing bond, and I am worth the sum of two thousand dollars over and above all my debts and liabilities and property exempt by law from execution.

EUGENE KELLY.

13 Sworn to before me, this 27th day of December, 1880.

[SEAL.] WILLIAM H. DELANCEY,
Notary Public,
Westchester & N. Y. Co's.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

PETER GEDDES, being duly sworn and examined, deposes and says: I am one of the bondsmen
14 named in the foregoing bond, and I am worth the sum of two thousand dollars over and above all my debts and liabilities and property exempt by law from execution.

P. GEDDES.

Sworn to before me, this 29th day of December, 1880.

WILLIAM H. DE LANCEY,
[L. S.] *Notary Public*,
Westchester and N. Y. Cos.

15

UNITED STATES OF AMERICA, *Southern District of New York*, } ss.:

JOHN T. TERRY, being duly sworn and examined, deposes and says: I am one of the bondsmen named in the foregoing bond, and I am worth the sum of two thousand dollars over and above all my debts and liabilities and property exempt by law from execution.

JOHN T. TERRY.

16 Sworn to before me, this 29th day of December, 1880.

WILLIAM H. DE LANCEY,
[L. S.] *Notary Public*,
Westchester and N. Y. Cos.

UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

EUGENE PLUNKETT, being duly sworn and examined, deposes and says: I am one of the bondsmen named in the foregoing bond, and I am worth the sum of two thousand dollars over and above all my debts and liabilities and property exempt by law from execution.

EUGENE PLUNKETT.

Sworn to before me this 29th day of December, 1880.

WILLIAM H. DE LANCEY,
[L. S.] *Notary Public*,
Westchester and N. Y. Cos.

UNITED STATES OF AMERICA, } ss.:
Southern District of New York. }

SOLON HUMPHREYS, being duly sworn and examined, deposes and says: I am one of the bondsmen named in the foregoing bond, and I am worth the sum of two thousand dollars over and above all my debts and liabilities and property exempt by law from execution.

SOLON HUMPHREYS.

Sworn to before me this 27th day of December, 1880.

WILLIAM H. DELANCEY,
[L.S.] *Notary Public*,
Westchester and N. Y. Co.

UNITED STATES OF AMERICA, } ss.:
Southern District of New York. }

WILLIAM H. FARRALL, being duly sworn, deposes and says: I am well acquainted with Eugene Plunkett, one of the sureties named in the foregoing bond, and know of my own knowledge that he is worth the sum of two thousand dollars over and above all

his debts and liabilities and property exempt, by law from execution.

WILLIAM H. FARRELL.

Sworn to before me, this 30th day of December, 1880.

WILLIAM H. DE LANCEY,
[L. S.] *Notary Public*,
Westchester and N. Y. Co.

UNITED STATES OF AMERICA, *Southern District of New York.* } ss.:

S. NEWTON SMITH, being duly sworn, deposes and says: I am well acquainted with Solon Humphreys, one of the sureties named in the foregoing bond, and know of my own knowledge that he is worth the sum of two thousand dollars, over and above all his debts and liabilities, and property exempt by law from execution.

S. NEWTON SMITH.

Sworn to before me this 30th day of December, 1880.

WILLIAM H. DE LANCEY,
[L.S.] *Notary Public*,
Westchester and N. Y. Co.

By the Honorable John Baxter, United States Judge, in and for the Sixth Judicial Circuit, Middle District of Tennessee.

I hereby approve the foregoing bond, as to form and manner of execution, and as to the amount thereof, and the sufficiency of the sureties, and direct that the same shall operate as a supersedeas.

Dated, January 6th, 1881.

JNO. BAXTER,
United States Judge.

CIRCUIT COURT OF THE UNITED STATES,

SIXTH JUDICAL CIRCUIT—WESTERN DISTRICT OF TENNESSEE.

IN EQUITY.

CALVIN AMORY STEVENS, EUGENE KELLY, JOHN T. TERRY and PETER GEDDES on behalf of the holders of Interal Improvement Bonds of Tennessee issued to the MEMPHIS & OHIO RAILROAD COMPANY,

vs.

THE LOUISVILLE, NASHVILLE & GREAT SOUTHERN RAILROAD COMPANY.

I, BELL W. ETHERIDGE, Clerk of the above named Court, hereby certify that the foregoing is a true copy of the record in the above entitled cause, and which are necessary to a hearing in the Supreme Court of the United States, and that the same are prepared according to the request of the solicitors for appellants in this cause.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Court, the 8th day of September, 1881, and the one hundreth and six of American Independence.

BELL W. ETHERIDGE,
Clerk.

W. B. WEISEGER,
D. Clerk.